DOCKET

No. 86-1406-COX
Status: GRANTED

Title: Puerto Rico Department of Consumer Affairs, et al., Petitioners
v.
Isla Petroleum Corporation, et al.

Docketed:
March 2, 1987

Court: Temporary Emergency Court of Appeals of the United States

Counsel for petitioner: Coleman,Lynn R.

Counsel for respondent: Evans,Mark L., Perez-Bachs,Rafael, Craven,Donald B.

Entry	Date	Note	Proceedings and Orders
1	Mar 2 1987	G	Petition for writ of certiorari filed.
2	Mar 6 1987		Appendix of petitioner PR Dept. of Consumer Affairs filed.
3	Apr 7 1987	G	Motion of Associacion de Detallistas de Gasolina de Puerto Rico for leave to file a brief as amicus curiae filed.
4	Apr 8 1987	X	Brief of respondents Esso Standard Oil Co., et al. in opposition filed.
5	Apr 8 1987		DISTRIBUTED. April 24, 1987
6	Apr 8 1987		REDISTRIBUTED. April 24, 1987
8	Apr 8 1987	X	Brief of respondents Shell Oil of PR, et al. in opposition filed.
7	Apr 10 1987	X	Brief amici curiae of Wisconsin, et al. filed.
9	Apr 10 1987	G	Motion of New York, et al. for leave to file a brief as amici curiae filed.
10	Apr 21 1987	X	Reply brief of petitioner PR Dept. of Consumer Affairs filed.
11	Apr 22 1987		Opposition of respondents Shell, et al. to motion of Asociacion de Detallistas de Gasolina de PR for leave to file a brief as amicus curiae filed.
15	Apr 24 1987		Brief of respondents Shell Co., et al. in objection and response to amicus curiae brief of National Assn. of State Energy Officials filed.
12	Apr 27 1987		Motion of Associacion de Detallistas de Gasolina de Puerto Rico for leave to file a brief as amicus curiae GRANTED. Justice O'Connor OUT.
13	Apr 27 1987		Motion of New York, et al. for leave to file a brief as amici curiae GRANTED. Justice O'Connor OUT.
14	Apr 27 1987	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States. Justice O'Connor OUT.
16	Aug 21 1987		Brief amicus curiae of United States filed.
17	Aug 26 1987		REDISTRIBUTED. September 28, 1987
18	Aug 31 1987	X	Supplemental brief of respondents Isla Petroleum Corp., et al. filed.
19	Aug 31 1987		Lodging received.
20	Sep 8 1987	X	Brief of respondents Shell Oil Co. of PR, et al. in opposition to the brief of the United States as amicus curiae filed.
21	Oct 5 1987		Petition GRANTED. Justice O'Connor OUT.

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No. 86-1406-COX

Entry	Date	Note	Proceedings and Orders
22	Nov 19 1987		Brief amici curiae of Natl. Governors' Assn., et al. filed.
23	Nov 19 1987		Joint appendix filed.
24	Nov 19 1987		Brief of petitioner PR Dept. of Consumer Affairs filed.
25	Nov 19 1987		Brief amicus curiae of United States filed.
26	Nov 19 1987		Brief amici curiae of New York, et al. filed.
27	Nov 25 1987		Record filed.
		*	Certified copy of original record, box, received.
30	Dec 1 1987	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
29	Dec 4 1987		Order extending time to file brief of respondent on the merits until January 11, 1988.
31	Dec 14 1987		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice O'Connor OUT.
32	Jan 5 1988		SET FOR ARGUMENT. Monday, February 29, 1988. (4th case). (1 hour).
33	Jan 11 1988		Brief of respondents Shell Oil Co. of PR, et al. filed.
34	Jan 11 1988		Brief amicus curiae of New England Fuel Institute filed.
35	Jan 11 1988		Brief amicus curiae of American Petroleum Institute filed.
36	Jan 11 1988		Brief of respondents Esso Standard Oil Company, et al. filed.
37	Jan 11 1988		Brief amicus curiae of Petroleum Marketers Assn. of America filed.
38	Jan 11 1988		LODGING by respondents Esso Standard Oil Co., et al. (letters)
39	Jan 11 1988		LODGING by respondents Shell Oil Co., et al. (2 Energy Reports and memoranda)
40	Jan 14 1988		CIRCULATED.
41	Feb 10 1988	X	Reply brief of petitioners PR Dept. of Consumer Affairs filed.
42	Feb 29 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86 1406

No. ——

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,
Petitioners,

v.

ISLA PETROLEUM CORPORATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

LYNN R. COLEMAN *
DOUGLAS G. ROBINSON
MATTHEW W.S. ESTES
WILLIAM S. SCHERMAN
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Eighteenth Street, N.W.
Washington, D.C. 20006
(202) 463-8700

MARCOS A. RAMIREZ IRIZARRY
DENNIS A. SIMONPIETRI MONEFELDT
RAMIREZ & RAMIREZ
117 Eleanor Roosevelt Avenue
Hato Rey, Puerto Rico 00918
(809) 758-5660

HECTOR RIVERA CRUZ
Secretary of Justice
Commonwealth of Puerto Rico

RAFAEL ORTIZ CARRION
Solicitor General
Commonwealth of Puerto Rico

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTIONS PRESENTED FOR REVIEW

1. Did Congress intend that the Emergency Petroleum Allocation Act of 1973, as amended (the "EPAA"), would permanently preempt state regulation of petroleum prices even after the expiration of the EPAA itself in 1981?

2. Did *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board*, 106 S. Ct. 709 (1986), fundamentally alter traditional preemption principles, reversing the presumption that state law is not preempted absent a clear and manifest congressional intent to do so?

LIST OF PARTIES

Petitioners

1. Department of Consumer Affairs of the Commonwealth of Puerto Rico.
2. Pedro Ortiz Alvarez, Secretary of the Department of Consumer Affairs.

Respondents

1. The Shell Company (Puerto Rico) Ltd.
2. Mobil Oil Caribe, Inc.
3. Phillips Puerto Rico Core, Inc.
4. Caribbean Gulf Refining Corp.
5. Texaco Puerto Rico, Inc.
6. Esso Standard Oil Co. (P.R.)
7. Isla Petroleum Corp.
8. Gasolinas de Puerto Rico Corp.
9. Tenoco Oil Co., Inc.*
10. Cia. Petrolera, Inc.*

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* Tenoco Oil Co., Inc. and Cia. Petrolera, Inc. were parties to the District Court proceeding but did not participate in the TECA proceeding.

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OCTOBER TERM, 1986

No. ——

PUERTO RICO DEPARTMENT OF
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Petitioners,

v.

ISLA PETROLEUM CORPORATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

Petitioners, the Department of Consumer Affairs of the Commonwealth of Puerto Rico and its Secretary, Pedro Ortiz Alvarez (collectively, "DACO"), hereby respectfully petition for a writ of certiorari to be issued to the Temporary Emergency Court of Appeals ("TECA"), so that this Court may review TECA's decision upholding an injunction issued by the United States District Court for the District of Puerto Rico. The sole basis for TECA's decision is that Puerto Rico and all fifty states are permanently preempted by the Emergency Petroleum Allocation Act—a statute that expired by its own terms over five years ago—from regulating the prices at which gasoline may be sold at the local level.[1]

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[1] The District Court's preemption ruling was appealed to TECA because that court has exclusive appellate jurisdiction over all

OPINIONS BELOW

The Memorandum Opinion and Order of the District Court for the District of Puerto Rico is reported at 640 F. Supp. 474 (D.P.R. 1986). TECA's Opinion, together with the dissenting opinion, issued on December 29, 1986, and the Order denying DACO's request for rehearing, issued on January 30, 1987, have not yet been reported, and are attached as Appendices A and B, respectively.

JURISDICTION OF THIS COURT

TECA's Judgment was entered on December 29, 1986. On January 12, 1987, DACO timely petitioned that court for rehearing and suggested that the case be reheard *en banc*. On January 30, 1987, DACO's petition and suggestion were denied. This petition for a writ of certiorari is being filed pursuant to 28 U.S.C.A. § 1254(1) (1966) and Section 5(a)(1) of the EPAA, 15 U.S.C.A. § 754(a)(1) (1976). Section 5(a)(1) of the EPAA incorporates by reference the review provisions of Section 211(g) of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C.A. § 1904 note (1980). Section 211(g) of the ESA provides that within thirty days after entry of any judgment or order by TECA, a petition for writ of certiorari may be filed in the Supreme Court, and thereupon the judgment or order shall be subject to review in the same manner as provided in 28 U.S.C.A. § 1254(1).

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claims arising under the EPAA. EPAA § 5(a)(1), 15 U.S.C.A. § 754(a)(1) (1976) incorporating the review provisions of Section 211 of the Economic Stabilization Act of 1970, 12 U.S.C.A. § 1904 note (1980)). The District Court's alternative holdings that the orders in question also violated substantive due process and the Takings Clause of the Constitution have been appealed by DACO to the United States Court of Appeals for the First Circuit. *Tenoco Oil Co., Inc. v. Department of Consumer Affairs*, No. 86-1590 (1st Cir. appeal docketed June 19, 1986). That appeal has been stayed pending the outcome of this petition.

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

Section 18 of the EPAA, 15 U.S.C.A. § 760g (1976), which provides for the EPAA's termination, is attached as Appendix C. Section 3 of Puerto Rico's Law No. 228 of 1942, 23 L.P.R.A. § 743 (1964), which grants the authority to regulate the price of staple commodities, is attached as Appendix D. Section 6(a) of Puerto Rico's Law No. 5 of 1973, 3 L.P.R.A. § 341e(a) (1982), which grants DACO the authority to regulate the prices and profit margins of goods, products and services sold in Puerto Rico is attached as Appendix E. DACO Regulation No. 45, as amended, is attached as Appendix F. The three regulatory orders DACO issued in the spring of 1986 that DACO has been enjoined from enforcing are attached as Appendix G.

STATEMENT OF THE CASE

This petition for a writ of certiorari poses the important question of whether the Emergency Petroleum Allocation Act of 1973 ("EPAA"),[2] as amended by Title IV of the Energy Policy and Conservation Act of 1975 ("EPCA"),[3] despite its expiration on September 30, 1981, preempts states from exercising their police powers over

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[2] 15 U.S.C.A. §§ 751-760g (1976).

[3] 89 Stat. 941 (1975).

the marketing of petroleum. Inextricably bound to that analysis are the questions of whether this Court's decision in *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board*, 106 S. Ct. 709 (1986), (*"Transco"*): (i) reverses the traditional presumption that a state's exercise of its police power is not preempted by federal law unless Congress has clearly evidenced an intent to the contrary; and (ii) overrules *sub silentio* this Court's specific holding in *Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982) (*"Tully"*), that the EPAA has no post-termination preemptive effect.

Due to its small size and remote location, Puerto Rico has since 1942 regulated the wholesale and retail prices of staple commodities, most of which must be imported onto the island.[4] Among those commodities that have been regulated is gasoline,[5] which has been subject to price controls in Puerto Rico since at least 1953, shortly after the temporary federal price controls enacted during the Korean War expired.[6] That regulation continued uninterrupted until 1973, when Congress instituted a temporary federal system of petroleum price controls through

[4] The Puerto Rican legislature has enacted two separate statutory schemes pursuant to which DACO and its predecessor agencies have implemented such regulations. *See* Section 3 of Law No. 228 of 1942, 23 L.P.R.A. § 734 (1964); Section 6(a) of Law No. 5 of 1973, 3 L.P.R.A. § 341e(a) (1982).

[5] In 1978, the Puerto Rican legislature found that: (1) "[T]he gasoline industry in all its phases is declared as one vested with public interest," Section 1 of Act No. 73 of June 23, 1978, 23 L.P.R.A. § 1131 (Supp. 1983); and (2) "There is no real competition at the refining and retail and wholesale distribution levels in the gasoline industry, nor are there conditions that propitiate the development of such competition." *Id.*, Legislative Determinations. Section 1 of Act No. 73 is attached as Appendix H.

[6] Regulation No. 4 (1953), which was the first price order issued in 1953 and which formed the basis for Puerto Rican gasoline price regulation from 1953-73, is attached as Appendix I. These regulations had the effect of limiting the gross margins that could be realized by gasoline wholesalers and retailers on their sales within Puerto Rico.

the enactment of the EPAA. At that time, local regulation ceased, since the EPAA expressly preempted all state laws and regulations that conflicted with the federal regulations during the period of the EPAA's effectiveness.[7]

In 1975, in anticipation of the expiration of the EPAA and the lifting of the federal controls, DACO promulgated Regulation No. 45, which, as amended, provided the framework for the renewed Puerto Rican regulation of the gasoline industry subsequent to the EPAA's expiration. Article 3 of Regulation No. 45 required gasoline wholesalers and retailers to give DACO 15 days notice of all proposed price increases. Article 4 provided a mechanism by which DACO could exercise its statutory authority to fix gasoline prices or profit margins when the need arose. Regulation No. 45 provided that it would become effective when federal controls were lifted. In accordance with the discretionary authority granted by the EPAA, President Reagan terminated all federal price controls by executive order on January 28, 1981,[8] and DACO promptly declared Regulation No. 45 to be in effect. 640 F. Supp. at 481.[9]

In carrying out its price monitoring functions under Regulation No. 45, DACO observed in 1985 that local gasoline prices were not tracking the downward trend in world oil prices. This concern heightened in the first quarter of 1986, when world oil prices decreased dramatically. DACO determined that some local gasoline wholesalers were able to increase their profit margins substantially simply by failing to pass on fully their reductions in acquisition costs to their customers. App.

[7] EPAA § 6(b), 15 U.S.C.A. § 755(b) (1976). *See also* App. A at 3a.

[8] Exec. Order No. 12,287, 46 Fed. Reg. 9909 (Jan. 30, 1981).

[9] In the proceedings below, there were disputed issues of fact concerning the extent of DACO's regulation of gasoline prices

G at 50a. In response to these conditions, DACO promulgated a series of three orders, the last and most relevant of which, issued on May 20, 1986, provided explicitly for the regulation of wholesalers' gross profit margins.

All of Puerto Rico's refiners and wholesale marketers countered by filing eight separate suits in the District Court, asking that DACO be enjoined from regulating the wholesalers' margins.[10] These suits were consolidated and, on June 6, 1986, after a three-day trial, the District Court permanently enjoined DACO from further regulation of gasoline at either the wholesale or retail level.[11] The court based the injunction upon its conclusion, *inter alia*, that DACO's regulation of local petroleum prices is preempted by the EPAA. 640 F. Supp. at 514-15.

DACO appealed the District Court's preemption holding to TECA, a three-judge panel of which affirmed over a strong dissent by Judge Christensen. The majority recognized that this Court previously held in *Tully* that state regulation of petroleum prices is not preempted subsequent to the expiration of the EPAA. App. A at

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since 1981 and the level of the Puerto Rican wholesalers' profit margins in 1986. These disputed issues are relevant, if at all, only to the District Court's substantive due process and Takings Clause holdings currently pending before the First Circuit. There is no dispute, however, that DACO, acting under authority of Puerto Rico law, issued orders in 1986 that regulated local gasoline prices. This is the only fact necessary to resolve the purely legal question here of whether state authority to issue such regulations has been preempted.

[10] The plaintiffs, alleging primarily that DACO's orders were unconstitutional under the Supremacy Clause and the Fifth and/or Fourteenth Amendments, relied upon 28 U.S.C.A. § 1331 (Supp. 1986), to assert the District Court's jurisdiction. There was no claim made in any of the complaints that the orders at issue here violate the Commerce Clause of the U.S. Constitution.

[11] The District Court's injunction extends to retail margins even though the orders in question did not regulate such margins and no plaintiff explicitly challenged DACO's regulations at that level.

11a. The majority went on to hold, however, that "[a]lthough *Tully* appears to answer the question we now face, the context of its appeal to the Supreme Court and the Supreme Court's recent decision in [*Transco*] convince us that *Tully* is not an appropriate guide for our decision." *Id.*

The majority's reliance upon *Transco* to disregard the *stare decisis* effect of *Tully* stemmed from its reading of *Transco* as signaling a departure from traditional preemption analysis. Instead of looking for a clear and manifest congressional intent to preempt state regulation, the majority held that unless Congress affirmatively expressed an intent to *permit* state regulation of gasoline prices upon the EPAA's expiration, DACO's regulations would be preempted. App. A at 12a. Because the majority found no evidence that Congress explicitly granted this authority to the states, it held that the EPAA will continue indefinitely to preempt state petroleum regulation, despite the complete expiration[12] of that statute over five years ago. *Id.*

Judge Christensen, writing in dissent, stated that the federal controls enacted under the EPAA were, "as our decisions demonstrate time and time again . . . of emergency origin and sustained and interpreted in light of the emergency." *Id.* at 20a (citation omitted). With the nature and purpose of the EPAA in mind, Judge Christensen noted:

> It is paradoxical that expiration of such temporary emergency measures, designed and administered for another purpose, should have the effect of permanently constraining the ordinary exercise of the po-

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[12] By its terms, the extent of the EPAA's continuing effect is found in its narrow savings clause, which merely preserves judicial and administrative proceedings that were pending on the date of expiration or that are "based upon any act committed or liability incurred prior to such expiration date." EPAA § 18, 15 U.S.C.A. § 760g (1976).

> lice powers of state governments which presented no problem within the recognition of Congress except in emergency context and which had nothing to do with the adoption of the Act.

Id. Judge Christensen also found no reason in *Transco* to depart from this Court's on-point *Tully* holding, believing *Transco* to be "clearly distinguishable." *Id.* at 19a.

On January 12, 1987, DACO petitioned TECA for rehearing and suggested that the rehearing be *en banc*. That petition was denied on January 30, 1987.

REASONS FOR GRANTING THE WRIT

I. SUMMARY OF ARGUMENT

So far as Petitioners have been able to discover, prior to this case no federal court has ever found state law to be preempted by an expired federal statute. This is consistent with the fundamental precept of the Supremacy Clause that it is the "Laws" of the United States that are supreme. Indeed, in the one case where a fully-expired statute was involved—the *Tully* case—this Court held that such a statute could no longer have preemptive effect.

Tully involved the construction and application of the very statute at issue here—the EPAA—to similar local price regulation. Enacted in 1973 in response to the Arab oil embargo, the EPAA established temporary federal price and allocation controls over petroleum products. The Supreme Court in *Tully* expressly found that the expiration of the EPAA by its own terms in September 1981 signaled the end of the federal interest in petroleum allocation and price controls. Any preemptive effect that the statute otherwise had on state police power regulation was terminated. Subsequent legislative activity in this area confirms that both Congress and the Executive have agreed with the conclusion in *Tully* that the EPAA has no post-expiration preemptive effect.

TECA acknowledged but refused to apply *Tully*, relying instead on its reading of *Transco* to find preemption. TECA's reliance on *Transco* was misplaced, however, for in that case this Court used traditional Supremacy Clause analysis to examine the preemptive effect of the dramatically different statutory scheme for regulating the natural gas industry. Natural gas sales and transportation have long been and continue to be the subject of deep federal concern and regulation, as distinguished from the marketing of petroleum products, where, with the exception of the temporary period of federal intervention following the Arab embargo, most regulation has traditionally been at the state level. Rather than creating new preemption standards and implicitly overruling *Tully*—which, as TECA admits, is otherwise clearly on point—*Transco* is fully consistent with long-established principles and is readily distinguishable from *Tully*.

TECA's decision has profound implications that transcend the interests of the parties to this case, and even beyond the broad issue of petroleum industry regulation, to reach the entire area of federal-state regulations in our federal system. By misapplying *Transco* here, TECA has called into question whether this Court intended to alter the presumption "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). This salutary rule flows from the concept that police powers inhere in a state's sovereignty and are entitled to deference in our federal system, unless there is a clear exercise of preeminent federal authority. In view of the general trend toward deregulation at the federal level, it is particularly important that this Court make it clear that it did not intend in *Transco* to signal such a pro-

found alteration to this fundamental principle of federalism.

Even if these broad federalism implications were not present, this case would still raise the vitally important issue of whether the states may have any role in regulating a basic industry whose activities have immense local impact. Congress, the Executive and this Court have all viewed the EPAA as having granted temporary, now-expired authority to the President to deal with an energy emergency that has abated. By striking down the Commonwealth's regulations here, TECA has transformed the EPAA into a permanent bar to state regulation of prices and allocation at the local level—authority which is conceded to fall squarely within the traditional police power of the states. With no congressional standards or guidance other than the dimensions of the vacuum created by the expiration of the EPAA, the states, the oil companies and the lower federal courts can be expected to have widely divergent views as to the scope of the "free market" that TECA has prohibited the states from entering.

TECA's decision also has an important impact on Puerto Rico alone, since a federal court has effectively struck down as unconstitutional, in part, a Commonwealth statute. As this Court recently noted, "[f]ederal nullification of a state statute is a grave matter" where "review by this Court is particularly warranted . . . ." *Maine v. Taylor*, 106 S. Ct. 2440, 2446 (1986). The decision deprives Puerto Rico of the power to make decisions concerning the necessity and means of economic regulation of petroleum distribution in light of its unique market conditions. Moreover, this Court has recognized that the concerns raised by the federal invalidation of the exercise of the Commonwealth's police powers are magnified when considered in the context of the special status of Puerto Rico in the federal system. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 674 (1974). Thus, the import of TECA's decision on Puerto Rico's unique economic and political circumstances is alone grounds for granting the writ.

The issues presented by this case are so straightforward and TECA's decision is in such direct conflict with the decisions of this Court that the Court may wish to consider summary reversal.

II. TECA'S DECISION IS IN DIRECT CONFLICT WITH THIS COURT'S *TULLY* DECISION.

This is not the first time that this Court has addressed the question of whether the EPAA has any preemptive effect subsequent to its expiration. In February 1982, only five months after the EPAA expired, the Court resolved the very same question in *Tully*. Even the TECA majority conceded that, in the absence of its being overruled, *Tully* is controlling here. App. A at 11a.

A. The Temporary Federal Statutory Scheme Expired in 1981.

Prior to 1973, there was no prohibition against state price controls such as those in effect in Puerto Rico on local sales of petroleum products.[13] The situation changed, however, when in 1973 Congress enacted the EPAA as a temporary measure designed to lessen the impact of the market disruptions caused by the Middle East oil crisis.[14] As enacted, the EPAA had a life of only slightly more than a year, with a scheduled expiration date of February 28, 1975.[15] After several short

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[13] Regulation of the prices of essential commodities at the local level has long been recognized as within the traditional police powers of the states. *See Munn v. Illinois*, 94 U.S. 113 (1876); *Nebbia v. New York*, 291 U.S. 502 (1934).

[14] *See* EPAA § 2(b), 15 U.S.C.A. § 751(b) (1976).

[15] EPAA, Pub. L. No. 93-159, § 4(g)(1), 87 Stat. 628, 632 (1973).

extensions,[16] the EPAA was extended by Title IV of EPCA through September 30, 1981.

Pursuant to the EPAA and the EPCA amendments, the President, acting first through the Federal Energy Administration and later through the Department of Energy, promulgated comprehensive price and allocation regulations. The EPAA expressly preempted all conflicting state allocation regulations,[17] and state price control regulation was judicially held to conflict with the comprehensive federal regulatory scheme required by the EPAA. *See Mobil Oil Corp. v. Tully*, 653 F.2d 497 (TECA 1981), *vacated*, 455 U.S. 245 (1982); *Mobil Oil Corp. v. Dubno*, 492 F. Supp. 1004 (D. Conn. 1980), *aff'd in part, dismissed in part*, 639 F.2d 919 (2d Cir.), *cert. denied*, 452 U.S. 967 (1981). Puerto Rico respected the preemptive effect of the EPAA and did not attempt to exercise its own statutory price regulation authority while federal controls were in effect.

The EPCA extension of the EPAA also amended the Act to provide for a gradual phase-out of federal con-

[16] Emergency Petroleum Allocation Act-Extension, Pub. L. No. 93-511, 88 Stat. 1608 (1974); Emergency Petroleum Allocation Act of 1975, Pub. L. No. 94-99, 89 Stat. 48 (1975); Emergency Petroleum Allocation Act-Extension, Pub. L. No. 94-133, 89 Stat. 694 (1975).

[17] EPAA § 6(b), 15 U.S.C.A. § 755(b) (1976) ("The regulation under section 753 of this title and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government *if such provision is in conflict with such regulation or any such order.*") (emphasis added). TECA recognized that the explicit preemption provision in effect during the period of federal controls applied only when there was actual conflict between those controls and state regulation, App. A at 8a, but did not reconcile how there can now be even more pervasive preemption after the EPAA's expiration when there are no federal controls with which state regulation can conflict.

trols prior to ultimate expiration in September 1981.[18] Presidents Ford and Carter began this gradual phase-out by removing most categories of petroleum products from federal regulation. On January 28, 1981, President Reagan completed the process by removing all remaining federal price and allocation controls by Executive Order.[19]

Later that year, even the standby Presidential authority to reimpose controls expired pursuant to Section 18 of the EPAA, 15 U.S.C.A. § 760g (1976), which provided in pertinent part that "[t]he authority to promulgate and amend any regulation or to issue any order under this chapter shall expire at midnight September 30, 1981 . . . ."[20] Neither the statute nor the legislative history makes any reference to any effect on state law after the statute's expiration. It was against this background that the *Tully* case arose.

B. The *Tully* Decision Established That There Is No Post-EPAA Preemption.

In 1980, before the expiration of the EPAA, New York passed a gross receipts tax on the revenues oil companies derived from their activities within the state.[21]

[18] Prior to June 1, 1979, the President could decontrol a particular petroleum product subject to one-house legislative veto. EPAA § 12, 15 U.S.C.A. § 760a (1976). Between that date and September 30, 1981, the President's decontrol authority was not subject to prior congressional review. *See* EPAA § 18, 15 U.S.C.A. § 760g (1976). The President also had the power to reimpose such controls during this period.

[19] Exec. Order No. 12,287, 46 Fed. Reg. 9909 (Jan. 30, 1981).

[20] *See also* S. CONF. REP. NO. 516, 94th Cong., 1st Sess. 208, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 1956, 2050 (1975) ("As standby authority the Act expires on September 30, 1981.").

[21] Connecticut passed a similar tax and anti-passthrough provision in 1980 that was the subject of separate litigation. *See Mobil Oil Corp. v. Dubno*, 492 F. Supp. 1004 (D. Conn. 1980). The *Dubno* court found that the Connecticut statute was also pre-

The tax included an "anti-passthrough" provision that prevented the oil companies from passing on to consumers their increased costs resulting from the tax. The oil companies sued in federal court, claiming that the state statute in question effectively regulated petroleum prices through the anti-passthrough rule and thus was preempted by the EPAA. The District Court performed a detailed analysis of the EPAA's provisions, contrasted them with the state's anti-passthrough rule and concluded that a conflict between federal and state law was present. *Mobil Oil Corp. v. Tully*, 499 F. Supp. 888, 910 (N.D.N.Y. 1980). Enforcement of the anti-passthrough provision was permanently enjoined. *Id.* at 891.

On appeal, TECA affirmed. *Mobil Oil Corp. v. Tully*, 653 F.2d 497 (TECA 1981). TECA's decision was issued on June 10, 1981, after President Reagan terminated all federal controls on January 28, 1981, but while he still had authority to reimpose controls (which authority would not expire until September 30, 1981). TECA's opinion concluded with the following relevant statement:

> Any attempt by New York State to affect the structure of prices charged by the oil companies pursuant to federal regulation is barred by conflict with the federal scheme. The EPCA expires by its terms on September 30, 1981. 15 U.S.C. § 760g. . . . *When the statute expires in September 1981, it will signal the end of federal concern in this area. Until that time* the state statute is in conflict with the federal statute and regulations.

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empted by the EPAA. 492 F. Supp. at 1015. This decision was appealed to the Court of Appeals for the Second Circuit, which did not reach the merits because it concluded that TECA had exclusive jurisdiction to resolve the preemption issue. *Mobil Oil Corp. v. Dubno*, 639 F.2d 919, 921-22 (2d Cir.), *cert. denied*, 452 U.S. 967 (1981).

653 F.2d at 502 (emphasis added). Thus, TECA did not believe—at that time—that the EPAA had preemptive effect beyond its expiration date.

An appeal from TECA's decision was filed with this Court. On October 13, 1981, two weeks *after* expiration of the EPAA, this Court asked the parties for their views on whether expiration of the statute mooted the case. *See* Letter from Alexander L. Stevas, Clerk, United States Supreme Court, to all Counsel of Record in *Tully v. Mobil Oil Corp.*, No. 81-96, October 13, 1981, attached as Appendix J. The parties responded that there were some pre-decontrol issues related to application of the tax and anti-passthrough rule prior to the EPAA's expiration, and therefore the case was not entirely moot. Significantly no party (including affiliates of several of the plaintiffs below) asserted that the EPAA had preemptive effect beyond its expiration date.

On February 22, 1982, the Supreme Court *per curiam* vacated and remanded the injunction for reconsideration in light of the expiration of the EPAA. After reviewing the procedural history of the case, the Court stated:

> [TECA], in turn, affirmed the District Court's decision, but noted that the federal statute would expire by its own terms in September 1981, and that expiration of the Act 'will signal the end of federal concern in this area'. . . .
>
> New York State tax officials then appealed TECA's decision to this Court. We now vacate the judgment and remand the case to TECA for reconsideration in light of the expiration of federal price control authority.
>
> The normal rule in a civil case is that we judge it in accordance with the law as it exists at the time of our decision. . . . The expiration date for the federal statute has come and gone; *the only barrier to the enforcement of the antipassthrough provision*

> *no longer exists.* However, the injunction entered by the District Court and affirmed by TECA did not terminate on October 1, 1981, the date that TECA acknowledged to signal the end of federal concern in the area. Thus, *in its present form the declaration of the invalidity of the antipassthrough provision and the accompanying injunction against enforcing it have no current validity and must be set aside.*

Tully, 455 U.S. at 246-47 (citations and footnotes omitted) (emphasis added).

In view of this Court's basis for vacating the District Court's injunction—*i.e.*, that it extended beyond the expiration date of the statute—the *Tully* decision can only be interpreted as a direct ruling on the EPAA's post-termination effect on state law. Indeed, the Court went on to emphasize this point:

> To be sure, the expiration provision contained in the EPAA states that 'such expiration shall not affect any action or pending proceedings, administrative, civil, or criminal, not finally determined on such date, nor any administrative, civil, or criminal action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration date.' 15 U.S.C. § 760g.
>
> Whatever bearing this saving clause may have upon other aspects of the case, *it surely cannot mean that, despite the expiration of the pre-empting federal law, New York should be permanently enjoined from enforcing its antipassthrough provision.*

455 U.S. at 247 n.2 (emphasis added). Simply stated, this Court decided in *Tully* that state regulation of petroleum prices is not preempted subsequent to the expiration of the EPAA. As Judge Christensen noted in his dissent, this is "the very point controlling here . . . ." App. A at 23a.

C. Congressional and Executive Action After the EPAA's Expiration Confirms That the EPAA Has No Continuing Preemptive Effect.

That the *Tully* decision correctly reflects congressional intent is confirmed by the post-EPAA legislative history, which demonstrates that (i) Congress has recognized that there is no preemption of state law after the EPAA's expiration, and (ii) all congressional attempts to reassert federal supremacy over state petroleum regulation have been defeated.

When the EPAA expired, there were many in Congress who believed that the President should have at least some continuing discretionary authority to reimpose temporary price and allocation controls on petroleum products as part of an overall national program to deal with oil supply emergencies. Therefore, in March 1982 Congress passed the Standby Petroleum Allocation Act ("SPAA"), which provided such authority.[22] Included in the SPAA was a provision that would have expressly preempted all state price or allocation regulation.[23] This provision was offered by its proponents as

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[22] S. 1503, 97th Cong., 2d Sess., 128 CONG. REC. H409 (daily ed. Feb. 22, 1982).

[23] The preemption provision of the SPAA provided in relevant part that:

> the enactment of this part supersedes and preempts any provision of any law or regulation adopted or promulgated by a State or any political subdivision thereof to the extent that such law or regulation provides for the pricing or allocation of any petroleum product.

128 CONG. REC. at H411. The oil industry supported the SPAA and in particular its express preemption provision. *See* 128 CONG. REC. S1360 (daily ed. Mar. 2, 1982); *see also* 128 CONG. REC. S2723-24 (daily ed. Mar. 24, 1982).

necessary because, with the expiration of the EPAA, no such preemption existed.[24]

The U.S. Department of Energy urged the President to veto the SPAA, because, among other things, the preemption provision conflicted with the President's view on federalism.[25] The President did veto the bill and thus thwarted Congress' attempt, *inter alia*, to reimpose federal preemption of state petroleum regulations.[26] 128 CONG. REC. S2513 (daily ed. Mar. 22, 1982). During the unsuccessful effort to override the President's veto, the proponents of the bill again cited the need to provide for federal preemption if another energy emergency arose.[27]

A final congressional effort to provide the President with standby authority and to preempt state regulation was made in 1983 by Senator McClure, Chairman of the Senate Energy and Natural Resources Committee. In responding to the proposed bill,[28] which contained a pre-

[24] *See, e.g.*, S. REP. No. 199, 97th Cong., 1st Sess. 11-12 (Sept. 9, 1981).

[25] *See* 128 CONG. REC. S1367 (daily ed. Mar. 2, 1982) (U.S. Department of Energy recommended that the President veto the SPAA because "[t]he bill is in direct conflict with the President's Federalism program.").

[26] The President's veto message cited only his view that he did not need or want the standby authority created by the Act. 128 CONG. REC. S2513-14 (daily ed. Mar. 22, 1982); *see* 640 F. Supp. at 511-12.

[27] *See* 128 CONG. REC. at S2729 (daily ed. Mar. 24, 1982) (Senator Henry Jackson, ranking minority member of the Senate Energy Committee (and its Chairman when the EPAA and EPCA were passed), urged his colleagues to override the President's veto "[i]f for no other reason . . . . [than] just to establish a strong Federal preemption provision that will bring some order to petroleum markets both before and during petroleum supply disruptions.").

[28] S. 1678, 98th Cong., 1st Sess., 129 CONG. REC. S10,762 (daily ed. July 25, 1983).

emption provision similar to the one vetoed in the SPAA, the Administration was explicit in its disapproval of the federal preemption provision:

> Proposed new EPCA Section 275 would preempt all such laws in advance of any emergency, irrespective of their purposes or effects, while leaving it to the President to carve out limited exceptions to the general prohibition. We think this reverses the presumption that ought to apply to State and local laws, and represents an unwarranted departure from principles of Federalism.[29]

The McClure bill was not reported by the Committee, and no further legislation in this area has been advanced.[30]

Thus, it is plain from post-EPAA events that both Congress and the Executive believe that there was not, and is not now, federal preemption of state law after

[29] *Energy Emergency Preparedness Act Amendments of 1983; And The International Energy Agency Program: Hearing Before The Senate Committee On Energy and Natural Resources*, 98th Cong., 1st Sess. 612 (Oct. 19, 1983) (letter from Helmut A. Merklein, Assistant Secretary for International Affairs and Energy Emergencies, United States Department of Energy, to Chairman James A. McClure, Senate Committee on Energy and Natural Resources, expressing the Administration's views on S. 1678).

[30] In 1982, a short time after the SPAA was vetoed, Congress enacted the Energy Emergency Preparedness Act of 1982 ("EEPA"), 42 U.S.C.A. §§ 6281-82 (1983), which merely required the Attorney General to advise Congress on the President's existing authority to deal with any energy emergency and of plans to use such authority. The memorandum submitted by the Attorney General in compliance with the EEPA examined the relevant legislative history and case law and concluded, among other things, that there is no preemption of state law in this area. Office of Legal Counsel, Department of Justice, *Memorandum of Law, Legal Authorities Available to the President to Respond to a Severe Energy Supply Interruption or Other Substantial Reduction in Available Petroleum Products*, 70-74 (Nov. 15, 1982). The EEPA itself expressly provided that nothing in that act would preempt state regulation. 42 U.S.C.A. § 6282(c)(2).

expiration of the EPAA.[31] In light of this unanimity of opinion among the other two branches of the federal government, there can be no real doubt that the Court's analysis of congressional intent in *Tully* was correct.

D. *Transco* Did Not Overrule *Tully*.

Despite expressly recognizing that "*Tully* appears to answer the question we now face," App. A at 11a, TECA found that this Court's recent decision in *Transco* "convince[s] us that *Tully* is not an appropriate guide for our decision." *Id.* Judge Christensen disagreed, stating:

> There is in my judgment no warrant for us to disregard decisions of this Court and the Supreme Court to the contrary in a case admittedly in point, on the theory that they have been superseded by a later decision which I believe to be clearly distinguishable.

App. A at 19a. Upon review of the *Transco* decision and the traditional preemption analysis used by the

[31] TECA concluded that the post-expiration legislative history demonstrated that Congress did intend to preempt state law after the EPAA's expiration. App. A at 17a. In order to reconcile this conclusion with the abundant evidence to the contrary, TECA was forced to conclude that the failed efforts to enact preemption provisions as part of standby emergency authority show that "only in shortages creating 'energy emergencies' do states have the power to regulate petroleum product allocation and prices." *Id.* at 18a; *see also* 640 F. Supp. at 514. This conclusion flies in the face of logic and the legislative history. First, there clearly is nothing in the EPAA or the EPCA amendments to support this construction. Following the EPAA's expiration, it is inconceivable that the several years of failed congressional attempts to enact preemption provisions (which by their own terms were not confined to energy emergencies) could form the basis for *creating* an energy emergency *exception* to federal preemption of the field. It also defies logic that Congress would intend preemption to occur when supplies are generally abundant and federal concern is at a minimum but not to occur when there is another shortage and federal interest in a uniform response would be at its greatest.

Court in reaching that ruling, it is clear that Judge Christensen is correct.

Transco involved the question of congressional intent in enacting the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C.A. §§ 3301-3432 (1982), and, more narrowly, whether enactment of the NGPA called for a holding different from *Northern Natural Gas Co. v. State Corporation Commission*, 372 U.S. 84 (1963), where a state ratable purchase order like that involved in *Transco* had been held preempted by the Natural Gas Act of 1938 ("NGA"), 15 U.S.C.A. §§ 717-717w (1976). *See* 106 S. Ct. at 714. Under the NGA, the Federal Energy Regulatory Commission ("FERC") had regulated natural gas prices that producers charged in accordance with the "just and reasonable" standard of that statute. The NGPA revised that scheme by providing a complex system of precisely drawn statutory price controls that balanced a desire to hold down the price of flowing gas with the need to provide greater production incentives for newly-developed gas. Thus, over twenty different categories of gas were created, each with a different ceiling price. *See generally* 15 U.S.C.A. §§ 3311 to 3319. One of those categories, costly "deep gas," was completely deregulated in order to give the greatest possible incentive for its production. *See* NGPA Sections 107 and 121(b), 15 U.S.C.A. §§ 3317 and 3331(b) (1982).

The particular focus of this Court's inquiry in *Transco* was a Mississippi state regulation that required a pipeline to take such deep gas ratably from all producers in a certain gas field. Mississippi argued that because the federal government had withdrawn from the regulation of deep gas, Mississippi was free to issue regulations that affected that narrow category of gas. 106 S. Ct. at 716.

This argument was rejected by the Court on two grounds. First, because the FERC still pervasively regulated the pipeline's purchases and downstream sales of

all gas, including deregulated gas, Mississippi's rule, which required the pipeline to purchase more high-cost gas than it or its customers desired, directly conflicted with federal law. *Id.* at 718. The second ground was that since the NGPA specifically granted the states certain regulatory authority, Congress' failure to grant the states such authority with respect to deep gas was indicative of congressional intent that such gas not be regulated by the states. *Id.* at 717. It was the Court's discussion of this second ground that TECA relied upon in holding that state regulation is preempted absent a specific congressional grant of power. App. A at 12a, 14a.

That Congress specifically granted the states regulatory authority in some areas under the NGPA and did not grant such authority in others is obviously relevant in the context of the revision of a "comprehensive federal regulatory scheme," *Transco*, 106 S. Ct. at 717, especially where one aspect of that revision was to bring for the first time a portion of the intrastate gas market under federal control. The NGPA delicately balanced the needs of various categories of gas for unfettered production incentives and at the same time carefully and explicitly divided regulatory responsibility between the federal government and the states. Nothing in *Transco* indicates, however, that this Court intended for its discussion on this narrow point to be the basis for a wholesale departure from traditional preemption analysis.

That analysis has always "start[ed] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). *See also International Paper Co. v. Ouellette*, 107 S. Ct. 805, 811 n.11 (1987) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (same). In *Arkansas Electric*

Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375 (1983), the case upon which this Court relied in setting forth the "forgo regulation" preemption principle applied in *Transco*, the Court found that in assessing a preemption claim, the "relevant inquiry . . . is not whether Congress authorized or expected such [state] regulation, but whether it intended by its own actions to *forbid* it." 461 U.S. at 387 n.11 (citations omitted) (emphasis in original). None of the cases discussing preemption that have been decided by this Court subsequent to *Transco* even hint that that case represents a departure from the Court's traditional preemption analysis.[32] To the contrary, those cases reaffirm that "[t]he critical question in *any* pre-emption analysis is *always* whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Commission*, 106 S. Ct. at 1899 (emphasis added).[33]

The distinction between *Transco* and this case is obvious. *Transco* involved very narrow decontrol of a particular category of natural gas in the midst of a comprehensive, ongoing regulatory scheme. Here, Congress merely permitted a temporary regulatory scheme to expire in its entirety, without a single expression that the "unregulated market" to which conditions would "return"[34] would be anything other than the non-preempted

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[32] *See, e.g., International Paper Co. v. Ouellette; California Federal Savings and Loan Association v. Guerra*, 107 S. Ct. 683 (1987); *R.J. Reynolds Tobacco Co. v. Durham County*, 107 S. Ct. 499 (1986); *Wardair Canada, Inc. v. Florida Department of Revenue*, 106 S. Ct. 2369 (1986); *Louisiana Public Service Commission v. FCC*, 106 S. Ct. 1890 (1986).

[33] *See also Wardair Canada, Inc.*, 106 S. Ct. at 2372 (the Court has "consistently emphasized that the first and fundamental inquiry in *any* pre-emption analysis is whether Congress intended to displace state law . . . .") (emphasis added).

[34] The sole legislative history on which TECA relied for its determination that Congress intended by the 1975 EPCA amendments to create post-expiration preemption were statements in the

market that existed prior to 1973. In the context of this case, congressional silence on whether the states will be able to exercise police power regulation after the cessation of all federal authority is hardly the "clear and manifest" evidence needed to overcome the well-established presumption, unaltered by *Transco*, that Congress does not intend to preempt state regulation. Accordingly, TECA erred when it relied upon *Transco* to overrule *Tully*.

III. TECA'S DECISION THROWS INTO QUESTION A FUNDAMENTAL PRINCIPLE OF FEDERALISM THAT SHOULD BE CLARIFIED.

TECA's mistaken departure from the preemption principles established by this Court has profound implications for the relationship between the states and the federal government that go far beyond even the role that the states will have in regulating the petroleum industry. By holding that state law is preempted unless Congress expresses an intent to allow its operation, TECA's decision "overlook[s] the body of law relating to the sensitive interrelationship between statutes adopted by the separate, yet coordinate, federal and state sovereignties." *R.J. Reynolds Tobacco Co. v. Durham County*, 107 S. Ct. 499, 507 (1986) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 127 (1973)). There are scores of areas in which both state and federal law coexist. In many of these, Congress is silent on the scope of the state's role. In such instances,

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Conference Report concerning those amendments to the effect that the conferees wanted the "return" from "closely regulated" markets to "large[ly] unregulated" ones to be "gradual." *See* App. A at 13a; S. CONF. REP. NO. 516, 94th Cong., 1st Sess., 204, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 1956, 2045 (1975). These statements may reveal much about Congress' desire to have a smooth transition toward ultimate EPAA expiration, but they provide no support for the contention that it intended a "return" to a market even more devoid of regulation than ever existed prior to enactment of the EPAA.

this Court's presumption in favor of such coexistence has long been the beacon of Congress, the state legislatures and the lower federal courts in weaving together the fabric of federalism.

Letting TECA's reversal of the presumption stand in this case will inject confusion where none has previously existed. Clarification by this Court is particularly important in light of the recent trend to terminate regulation of many industries at the national level and the many cases that are likely to arise regarding the proper role of the states in the wake of such deregulation.

IV. THIS CASE WILL HAVE A PROFOUND IMPACT ON THE STATES' ABILITY TO APPLY THEIR HISTORICAL POLICE POWERS TO AN INDUSTRY THAT HAS HISTORICALLY BEEN ONE OF SIGNIFICANT LOCAL CONCERN.

Even if such broad issues of federalism were not present, granting of a writ would be warranted by the profound and direct impact TECA's decision will have on future regulation by the states of the local marketing practices of the petroleum industry.

TECA's holding is not limited to Puerto Rico's statutes and regulations, but applies to all states. App. A at 18a. If TECA's decision is not reversed here, the states will be preempted indefinitely from exercising their traditional police powers to regulate local aspects of an industry in which state governments have always had a keen interest. Such a far-reaching decision should not be made by a divided TECA panel.

By relying on an expired statute, TECA's decision effectively converted a statute that had "conflict" preemptive effect when it was operative into a statute with broader "occupation of the field" preemptive effect upon its expiration. Ironically, TECA held that this conversion occurred through the federal government's *with-*

drawal from the field when the statute expired. As Judge Christensen noted in dissent, because the federal program has terminated, the only "standard" for determining what future state activity is prohibited is each court's notion of how broad the vacuum is that was left by the EPAA's expiration. App. A at 26a-27a. Given the sweeping authority the Act once gave the President over both prices and allocation of all petroleum products at all levels of distribution, *see* EPAA § 4(a), 15 U.S.C.A. § 753(a) (1976), it is not apparent that TECA's decision leaves the states much room at all to regulate the petroleum industry, even peripherally. Certainly it will leave the lower federal courts struggling to reconcile that decision with this Court's far different approach in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978), where another kind of local regulation of this industry was upheld against similar claims of conflict with vaguely defined federal policies of "free competition." *Id.* at 133-34.[35]

V. THIS CASE WILL HAVE AN IMPORTANT IMPACT ON THE COMMONWEALTH OF PUERTO RICO.

Because of its remote location, small size and lack of natural resources, Puerto Rico, in the exercise of its own sovereignty, has determined that it must oversee the local distribution of certain staple commodities to its residents. This is especially true in the petroleum industry, where the wholesale distribution of gasoline is carried out by only a handful of companies.[36] TECA's decision thus deprives the Commonwealth's government of regulatory power long regarded as essential in dealing with Puerto Rico's unique market.

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[35] The *Exxon* case involved state regulations arguably far more intrusive than that involved here—legislation requiring integrated oil companies to divest themselves of their retail stations and to offer competitive price allowances uniformly to all dealers.

[36] *See* note 5, *supra*.

This Court has recognized that such federal nullification of state statutes is always a "grave matter" and "review by this Court is particularly warranted . . . ." *Maine v. Taylor*, 106 S. Ct. at 2446. And although Puerto Rico does not by law have the right to appeal to this Court when one of its statutes is effectively nullified by a federal court of appeals on federal constitutional grounds, *see Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970), the same federalism concerns which prompted Congress to grant the states the right to appeal under similar circumstances, 28 U.S.C.A. § 1254(2), warrant that a writ be granted here.

Moreover, this Court has repeatedly recognized that "a due regard for the status of [the] Commonwealth" requires that it be vigilant to the appropriate application to it of federal constitutional principles. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 674 (1974) (quoting *Wackenhut Corp. v. Aponte*, 266 F. Supp. 401, 405 (D.P.R. 1966), *aff'd*, 386 U.S. 268 (1967)). *See also Fornaris*, 400 U.S. at 42-43. Thus, while TECA's decision will effectively constrain the exercise of police powers by all fifty states, its peculiarly adverse effect on Puerto Rico alone would merit this Court's review.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioners respectfully request that this Court issue a writ of certiorari to the Temporary Emergency Court of Appeals. Additionally, given the direct conflict between TECA's decision and this Court's ruling in *Tully*, the Court may wish to consider summary reversal of TECA's decision. *See, e.g., Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147 (1981).

Respectfully submitted,

LYNN R. COLEMAN *
DOUGLAS G. ROBINSON
MATTHEW W.S. ESTES
WILLIAM S. SCHERMAN
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Eighteenth Street, N.W.
Washington, D.C. 20006
(202) 463-8700

MARCOS A. RAMIREZ IRIZARRY
DENNIS A. SIMONPIETRI MONEFELDT
RAMIREZ & RAMIREZ
117 Eleanor Roosevelt Avenue
Hato Rey, Puerto Rico 00918
(809) 758-5660

HECTOR RIVERA CRUZ
Secretary of Justice
Commonwealth of Puerto Rico

RAFAEL ORTIZ CARRION
Solicitor General
Commonwealth of Puerto Rico

* *Counsel of Record*

Dated: March 2, 1987
Washington, D.C.

APPENDICES

APPENDIX A

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 1-16

ISLA PETROLEUM CORPORATION, *et al.*,
Plaintiffs-Appellees,

v.

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,
Defendants-Appellants.

On appeal from the United States District Court
for the District of Puerto Rico
(District Court 86-0681, 86-0714, 86-0717, 86-0719,
86-0720, 86-0721, and 86-8730)

(Argued: October 10, 1986 Decided: December 29, 1986)

LYNN R. COLEMAN and DOUGLAS G. ROBINSON, Skadden, Arps, Slate, Meagher & Flom, Washington, D.C., were on the brief for the Appellants.

RAFAEL PEREZ-BACHS, ANA MATILDE NIN, NESTOR MENDEZ-GOMEZ, M GGIE CORREA-AVILES, McConnell, Valdes, Kelley, Sifre, Griggs & Ruiz-Suria, San Juan, Puerto Rico, were on the brief for Appellees The Shell Company, Ltd., Mobil Oil Caribe, Inc. and Phillips Puerto Rico Core, Inc., along with NOEL S. GONZALEZ-MIRANDA and MARIO L. PANIAGUA, Sweeting, Gonzalez & Cestero, San Juan, Puerto Rico, on the brief for Appellee Caribbean Gulf Refining Corporation and IGOR DOMINGUEZ, William Estrella Law Offices, Old San Juan, Puerto Rico, on the brief for Appellee Texaco Puerto Rico, Inc.

JAIME SIFRE-RODRIGUEZ and LUIS SANCHEZ BETANCES, Cepeda, Sanchez-Betances & Sifre, Hato Rey, Puerto Rico, along with DONALD B. CRAVEN, MARK L. EVANS, and

JAMES P. TUITE, Miller & Chevalier, Chartered, Washington, D.C., on the brief for Appellee Esso Standard Oil Company, P.R.

ALVARO R. CALDERON, JR., Hato Rey, Puerto Rico, was on the brief for Appellees Isla Petroleum Corporation and Gasolinas De Puerto Rico Corporation.

DANIEL JOSEPH and THOMAS A. LORENZEN, Akin, Gump, Strauss, Hauer & Feld, Washington, D.C., for *Amicus Curiae* American Petroleum Institute.

Before CHRISTENSEN *, ESTES, and JAMESON, Judges.

JAMESON, Judge:

Defendants-appellants, Puerto Rico Department of Consumer Affairs (DACO), *et al.*, have appealed from an order of the United States District Court for the District of Puerto Rico, enjoining them from implementing or enforcing orders fixing prices or profit margins in the gasoline wholesale or retail business, except in accord with federal law as described in the court's opinion.[1] Eight actions, filed by appellees, gasoline refiners and wholesalers, were consolidated for trial. The district court held, *inter alia*, that three orders, issued by DACO pursuant to a Puerto Rico statute, P.R. Laws Ann. tit. 23, § 734, and DACO's Regulation 45, were "pre-empted by the federal Congressional delegated purpose to let the market forces be the sovereign in this field." 640 F.Supp. at 515.[2] We affirm.

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* Judge Christensen filed a dissenting opinion.

[1] The opinion of the district court is reported in 640 F.Supp. 474.

[2] The district court ruled that the orders were unconstitutional because they (1) were arbitrary and confiscatory in violation of the Due Process Clause, (2) constituted an unlawful taking without just compensation under the Taking Clause, and (3) were pre-empted by federal law under the Supremacy Clause. Appeal of the first two issues was taken to the United States Court of Appeals for the First Circuit, which has denied appellants' motion for a stay of the district court's injunction.

I. *Background*

In 1942, the Puerto Rico Legislature enacted what is now 23 Puerto Rico Laws Annotated § 734. Section 734 purports to grant authority to regulate prices and profit margins of staple commodities which include gasoline. In 1973, the Puerto Rico legislature vested the authority granted by section 734 in the newly created DACO. P.R. Laws Ann. tit. 3, §§ 341-341v. Pursuant to this authority DACO and its predecessors regulated the price of gasoline and other petroleum products from 1953 to 1973.

Upon the enactment of the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. §§ 751-760*h* (as amended), DACO suspended its regulatory authority over gasoline prices and profit margins. In 1975, expecting the EPAA to expire on August 31, 1975, DACO issued Price Regulation 45 which would restore its price controls upon expiration of the EPAA. However, in 1975 Congress enacted the Energy Policy and Conservation Act (EPCA), 42 U.S.C. §§ 6201-6422, which extended federal price control authority to September 30, 1981. *See* 15 U.S.C. § 760g. DACO then amended Price Regulations 45 to provide that the price regulation authority would not become effective until "the Federal Price Controls are lifted over the articles here regulated. . . ." Federal price control authority expired on September 30, 1981.

In 1986, DACO issued a series of orders pursuant to Price Regulation 45 which are the subject of this appeal. The first order, issued March 26, 1986, emphasized a requirement contained in Article 3 of Regulation 45 that DACO be given advance notice of price increases. The second order, issued April 23, 1986, froze gasoline prices at March 31, 1986 levels. The third order, issued May 20, 1986, lifted the freeze on gasoline prices. It divided wholesalers into two groups—minor (Group 1) and major (Group 2). Group 1 wholesalers would be allowed to sell to retailers at a profit of 8.6 cents per gallon, and Group 2 at a profit of 3.6 cents per gallon. DACO issued

all of these orders pursuant to Regulation 45, Article 4, which purports to give DACO authority to fix prices and profit margins on the sale of gasoline in Puerto Rico.

In May, 1986, appellees, several oil companies, filed complaints in these actions, seeking declaratory and injunctive relief. The appellees alleged, *inter alia*, that federal law pre-empts DACO's authority to regulate gasoline prices and profit margins. The district court held that DACO's authority is pre-empted by a Congressional decision to leave the determination of gasoline prices to market forces. Specifically, the court found that the provisions of the EPCA which phased out the President's price control autority evidenced a Congressional intent to preclude any government regulation of gasoline prices. Consequently, the court held that Regulation 45 and the orders issued pursuant thereto were unconstitutional. The court issued an injunction enjoining DACO from "further implementing or enforcing orders fixing prices or margins of profit in the gasoline wholesale and retail business other than in accord with federal law as described in [its] opinion." The sole issue for this court's consideration is whether the EPAA as amended by the EPCA pre-empts DACO's authority to regulate gasoline prices and profit margins.

II. *Jurisdiction*

In a supplemental brief appellants contend that this court does not have jurisdiction over the entire pre-emption holding. We disagree.

The jurisdiction of this court over EPAA issues is governed by section 5(a) of the EPAA. Section 5(a)(1) incorporates section 211(b)(2) of the Economic Stabilization Act Amendments of 1971 (ESA), Pub. L. 92-210, 85 Stat. 743 (1971).[3] Section 211(b)(2) gives this court

[3] Section 5(a)(1) provides:

> Except as provided in paragraph (2), (A) sections 206 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on the date of enactment of this Act) shall apply to the regulation promulgated under section 4(a), to any order under this Act, and to any action taken by the President (or his delegate) under this Act, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) sections 212 (other than 212(b)) and 213 of such Act shall apply to functions under this Act to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, § 5(a)(1), 87 Stat. 627, 633 (1973) (as amended, codified at 15 U.S.C. § 754(a)(1)).

"exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under [the ESA] or under regulations or orders issued thereunder."[4] The courts have interpreted the incorporation of section 211(b)(2) of the ESA in section 5(a)(1) of the EPAA to mean that this court has exclusive appellate jurisdiction of all claims arising under either the ESA or the EPAA. *See Atlantic Richfield Co. v. Department of Energy*, 769 F.2d 771 (D.C. Cir. 1984); *Mobil Oil Corp. v. Tully*, 639 F.2d 912 (2d Cir. 1981); *Coastal States Marketing, Inc. v. New England Petroleum Corp.*, 604 F.2d 179 (2d Cir. 1979). An issue arising under either of these two acts is one which involves the construction, applicability or effect of the acts or the regulations promulgated under the acts. *Atlantic Richfield Corp. v. Department of Energy*, 769 F.2d at 778-79; *Mobil Oil Corp. v. Tully*, 639 F.2d at 915-16. Here the district court concluded that DACO's price

[4] Section 211(b)(2) provides in relevant part:

> Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder.

Economic Stabilization Act Amendments of 1971, Pub. L. 92-210, § 211(b)(2), 85 Stat. 743, 749 (1971).

controls are pre-empted by the EPAA. Review of the district court's determination necessarily involves the construction, applicability and effect of the EPAA. We, therefore, have exclusive jurisdiction to review the district court's determination of the pre-emption issue. In deciding this issue our task is to determine Congressional intent in enacting the various provisions of the EPAA. To determine this intent we may look not only to the circumstances surrounding the enactment and amendment of the EPAA, but also to other legislative sources which might shed light on Congressional intent with respect to enactment of the EPAA.

III. *Pre-emptive Issue*

A. *Congressional Intent*

As noted above, the primary task in deciding a pre-emption issue is to determine Congressional intent. *Wardair Canada, Inc. v. Florida Dep't. of Revenue*, 54 U.S.L.W. 4687, 4688 (U.S. June 18, 1986); *Louisiana Pub. Serv. Comm'n v. FCC*, 54 U.S.L.W. 4505, 4509 (U.S. May 27, 1986). In *Louisiana Public Service Commission v. FCC*, the Supreme Court summarized the circumstances under which pre-emption has been held to occur.

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), when there is outright or actual conflict between federal and state law, *e.g.*, *Free v. Bland*, 369 U.S. 663 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states

> to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

54 U.S.L.W. at 4509.

This case is somewhat unusual in that the claimed pre-emption results from the absence rather than the presence of federal authority. The Supreme Court, however, has held that pre-emption can occur under these circumstances. In the recent case of *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board*, 106 S.Ct. 709, 717 (1986) the Court said: "[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated and in that event would have as much pre-emptive force as a decision *to* regulate." (quoting from *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n.*, 461 U.S. 375, 384 (1983)) (emphasis in original).

B. *Price Control Legislation*

In determining the pre-emption effect of the federal decision to deregulate the gasoline market, we start with a brief summary of the history of federal price controls in the petroleum products market. Federal regulatory authority arose out of an effort to control inflation. In 1970, Congress enacted the Economic Stabilization Act of 1970, Pub. L. 91-379 §§ 201-206, 84 Stat. 796, 799-800 (1970). The ESA gave the President temporary authority "to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages and salaries at levels not less than those prevailing on May 25, 1970." This broad price control authority was originally scheduled to expire on February 28, 1971. Subsequent amendments, however, extended the expiration date to April 30, 1973.

In 1973, market disruptions caused by the OPEC oil embargo led to the enactment of the Emergency Petroleum Allocation Act of 1973, Pub. L. 83-159, 87 Stat. 627 (1973). Congress found that the continuation of federal price control authority over crude oil, residual fuel oil, and refined petroleum products was necessary to minimize "the adverse impacts of . . . shortages [of these products] or dislocations [in their national distribution systems] on the American people and the domestic economy." EPAA, Pub. L. 93-159 § 2(b), 87 Stat. at 628 (codified at 15 U.S.C. § 751(b)). Consequently, the EPAA directed the President to promulgate a regulation which would provide for the mandatory allocation of crude oil, residual fuel oil, and refined petroleum products. To avoid unfair and discriminatory pricing, the EPAA also directed the President to establish a program for determining equitable prices for these products. Pursuant to this authority, extensive price and allocation controls were promulgated. The result was a heavily regulated market. The EPAA contained an express preemption provision which precluded conflicting state and local regulation. *Id.* § 6(b), 87 Stat. at 633 (codified at 15 U.S.C. § 755(b)).[5] Thus, the EPAA clearly preempted regulation such as DACO's Price Regulation 45.

Two years after enactment of the EPAA, Congress enacted the Energy Policy and Conservation Act of 1975, Pub. L. 94-163, 89 Stat. 871 (1975). In enacting the EPCA, Congress re-examined the use of mandatory allo-

[5] Section 6(b) provides:

> The regulation under section 4 and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

EPAA, Pub. L. 93-159 (§ 6(b), 87 Stat. at 633 (codified at 15 U.S.C. § 755(b)).

cation and price control to alleviate the ill effects of supply disruptions and dependency on imported oil. Congress found that changed market conditions no longer warranted the extensive regulatory structure of the EPAA but that sudden decontrol would not be wise. H.R. Conf. Rep. No. 340. 94th Cong. 1st Sess. ——, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1762, 1816. Thus, Congress amended the EPAA to provide for gradual decontrol. *See* EPCA, Pub. L. 94-163 § 461, 89 Stat. at 955 (codified at 15 U.S.C. § 760g).[6] The EPCA achieved gradual decontrol by extending the President's mandatory authority under the EPAA for 40 months after enactment of the EPCA and thereafter allowing the President discretionary authority until September 30, 1981, at which time all authority expired. *Id.*

Pursuant to this policy the President exempted products on an individual basis until January 28, 1981, when President Reagan, through Executive Order No. 12287, 46 Fed. Reg. 9909 (1981), exempted all crude oil, residual fuel oil, and refined petroleum products from allocation and price controls. Congress then allowed federal

[6] Section 461 provides:

> Notwithstanding any other provision of this Act, at midnight on the conclusion of the 40th month in which the amendment under section 8(a) is in effect, the President's authority to promulgate, make effective, and amend a regulation pursuant to section 4(a) of this Act shall become discretionary rather than mandatory, and the limitations on the President's authority contained in sections 4(b)(2), 8, and 9 of this Act shall terminate. The authority to promulgate and amend any regulation or to issue any order under this Act shall expire at midnight September 30, 1981, but such expiration shall not affect any action or pending proceedings, administrative, civil, or criminal, not finally determined on such date, nor any administrative, civil, or criminal action or proceedings, whether or not pending, based upon any act committed or liability incurred prior to such expiration date.

EPCA, Pub. L. 94-163 § 461, 89 Stat. at 955 (codified at 15 U.S.C. § 760g).

price control authority to expire as planned on September 30, 1981. Throughout this period of decontrol, state and local regulation continued to be pre-empted. *Mobil Oil Corp. v. Dubno*, 492 F.Supp. 1004, 1014 (D. Conn. 1980), *aff'd in part, dismissed in part*, 639 F.2d 919 (2d Cir. 1981); *see also Mobil Oil Corp. v. Tully*, 499 F.Supp. 888, 910 (N.D. N.Y. 1980), aff'd, 653 F.2d 497 (Temp. Emer. Ct. App. 1981), *vacated and remanded*, 455 U.S. 245 (1982).

C. *Mobil Oil Corp. v. Tully*

DACO places primary reliance on the opinions of this court and the Supreme Court in *Mobil Oil Corp. v. Tully*. DACO argues that the pre-emption issue has already been decided in these two opinions. A review of *Tully*, however, in light of the Supreme Court's recent opinion in *Transcontinental, supra*, reveals that DACO's reliance is misplaced.

In *Mobil Oil Corp. v. Tully*, this court reviewed the district court's determination that an anti-passthrough provision of a New York tax on petroleum products was pre-empted by the EPAA. By the time this court decided *Tully*, President Reagan had lifted all price controls; yet, the EPAA itself had not expired. We affirmed the district court, but noted that federal price control authority would expire a short time later and at that time federal concern in the area and the conflict between the state and federal regulatory schemes would end. 653 F.2d at 502. The case was then appealed to the Supreme Court.

By the time the Supreme Court issued its decision, all federal price control authority had expired. Thus, the Supreme Court considered the pre-emption issue a different context than this court. Noting the recent expiration of federal price control authority, the Supreme Court vacated the judgment and remanded the case to this court "for reconsideration in light of the expiration of federal price control authority." *Tully v. Mobil Oil Corp.*, 455

U.S. 245, 246 (1982) (per curiam). The court stated: "The expiration date for the statute has come and gone; the only barrier to the enforcement of the antipass-through provision no longer exists." *Id.* at 247. The Court held that only "secondary issues" remained to be decided.[7] It left those secondary decisions for this court to decide. Justice Stevens, dissenting, concluded that the only issue properly before the Court was the pre-emptive effect of the EPAA prior to expiration, and that this court's opinion and the issues as framed by the parties addressed only the pre-emptive effect of the EPAA. *Id.* at 249-250 (Stevens, J., dissenting). Consequently, Justice Stevens stated, "Since the subsequent expiration of federal authority has no bearing on that question, I simply would affirm its [the TECA's] judgment." *Id.* at 251. Although *Tully* appears to answer the question we now face, the context of its appeal to the Supreme Court and the Supreme Court's recent decision in *Transcontinental* convince us that *Tully* is not an appropriate guide for our decision.

D. *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board*

In *Transcontinental*, the Court considered the pre-emptive effect of Congress' decision to deregulate the natural gas market. Pursuant to its ratable-take rule, Mississippi's State Oil and Gas Board issued an order requiring a pipeline company to purchase "high cost" natural gas in ratable portions from all interest holders in a common reserve regardless of existing contracts. Prior to the Oil and Gas Board's order, the Natural Gas Policy Act of 1978 (NGPA), removed the Federal Energy Regulatory Commission's (FERC) regulatory authority over first sales of high cost natural gas. *See*

[7] The secondary issues mentioned by the Court were the oil companies' ability to pass through taxes paid before expiration of federal price control authority and the validity of the "self-destruct" provisions of the New York Statute. *Tully v. Mobil Oil Corp.*, 455 U.S. at 248.

15 U.S.C. § 3331(b). Before enactment of the NGPA the FERC had such authority under the Natural Gas Act of 1938. The Court framed the issue before it as follows:

> The proper question in this case is not whether FERC has affirmative regulatory power over wellhead sales of § 107 [high cost] gas, but whether Congress, in revising a comprehensive federal regulatory scheme to give market forces a more significant role in determining the supply, the demand, and the price of natural gas, intended to give the states the power it had denied FERC.

Transcontinental, 106 S.Ct. at 717. The Supreme Court held that the removal of FERC's authority over first sales of high cost gas was part of a federal scheme to rely on market forces to determine the supply and price of natural gas. *Id.* at 716-17. Consequently, Congress' decision to rely on market forces pre-empted state and local regulation which interfered with those market forces. *Id.* at 717-18.

As in *Transcontinental*, we must determine whether by removing federal price control authority Congress intended to allow the states to step in and assume price control authority over gasoline. Our review of the legislative history of the EPCA convinces us that it did not.

E. *Legislative History of EPCA*

Under the EPAA and its amendments federal concern and regulatory authority in the crude oil, residual fuel oil, and refined petroleum products markets was pervasive. The federal regulatory scheme left little or no room for state and local regulation in the area. In enacting the EPCA, Congress found that due to changed conditions the federal regulatory structure no longer served the goals of the EPAA. The Senate Conference Report on the EPCA stated:

> [A] comprehensive regulatory structure of the scope outlined above may no longer be necessary. On the other hand, to allow such a comprehensive structure to expire, overnight, may itself create severe dislocations. To the extent that mandatory controls are no longer needed or desirable, a gradual return to an unregulated market is preferable to sudden decontrol.

S. Conf. Rep. No. 516, 95th Cong., 1st Sess. 203, *reprinted in* 1975 U.S. Code Cong. & Admin News 1956, 2045. Thus, Congress extended the EPAA and provided for conversion to standby regulatory authority. "Extension of the EPAA and its conversion to standby authority offer[ed] . . . the potential for a smooth transition of petroleum markets from a closely regulated state to a large[ly] unregulated status subject to standby pricing and allocation authority." *Id.* at 204, *reprinted in* 1975 U.S. Code Cong. & Admin. News at 2045. It is clear that Congress felt that the best mechanism to combat supply disruptions and the country's reliance on imported oil was to allow market forces to operate freely. The EPCA's gradual decontrol evidences a carefully controlled transition to an unregulated market. Throughout the transition the federal scheme continued to pre-empt state regulation in the area, even with respect to exempted products. *Mobil Oil Corp. v. Tully*, 653 F.2d at 502; *Mobil Oil Corp. v. Dubno*, 492 F.Supp. at 1014; *see also Tully v. Mobil Oil Corp.*, 455 U.S. at 250-51 (Stevens, J., dissenting). It is inconceivable that Congress would implement such an extensive and carefully orchestrated termination of federal intervention with the intention that the states step in to regulate the same subject matter as soon as all federal intervention ceased. A single state's regulation of petroleum products may not have a substantial effect on national markets. However, the possibility of over 50 individual regulatory schemes operating in the petroleum products markets clearly conflicts with and

frustrates Congress' goal of allowing market forces to regulate the supply and price of petroleum products.

Since the enactment of the ESA, the petroleum products markets have been subject to federal regulation. The OPEC oil embargo and consequent supply disruptions demonstrated the need for policy decisions at the national level. The enactment of the EPCA evidences Congressional recognition of the continuing necessity for a strong national policy on energy. Nothing in the legislative history of the EPCA convinces us that Congress' decision to remove federal controls should be interpreted "as an invitation to the States to impose additional regulations." *Transcontinental*, 106 S.Ct. at 717. On the contrary, the legislative history convinces us that Congress intended to establish a market free of *any* government control other than standby emergency controls.

F. *Post-expiration Actions*

Finally, DACO argues that legislative and executive actions taken after the expiration of federal price control authority demonstrate that neither Congress nor the President considered the expiration of federal authority to pre-empt state and local authority. DACO relies on the history of post-expiration attempts to structure a national plan for addressing energy emergencies. Specifically, DACO points to the President's veto of the Standby Petroleum Allocation Act of 1982 (SPAA), Congress' failure to override that veto, and the subsequent enactment of the Energy Preparedness Act of 1982 (EEPA). As we noted above, the jurisdictional constraints of this court allow us to look to these post-expiration actions only for the purpose of determining the intent of Congress in phasing out federal authority under the EPAA. We cannot look to these actions as a basis for pre-emption.

Our review of these post-expiration actions strengthens our conclusion that Congress intended to rely on market forces to determine the allocation and prices of petroleum

products. The inclusion of an express pre-emption provision in the SPAA, S. 1503 § 280(a), 97th Cong., 2d Sess., 128 Cong. Rec. H411 (daily ed. Feb. 22, 1982), might indicate that Congress did not believe that pre-emption survived the expiration of federal authority under the EPAA. However, it could also indicate that Congress was unsure about post-expiration pre-emption as a result of ongoing litigation in *Mobil Oil Corp. v. Tully* and wanted to reaffirm its position that allocations and price controls are a matter of federal concern.[8]

What is clear is that both supporters and opponents of the SPAA placed great reliance on market forces as the best means of avoiding supply disruptions. The regulatory authority granted by the SPAA was intended to be employed only in cases of "severe petroleum supply shortage". S. 1503 § 275(a)(1), 97th Cong., 2d Sess. ——, *reprinted in* 128 Cong. Rec. H410 (daily ed. Feb. 22, 1982). Otherwise, market forces would determine the allocation and prices of petroleum products. The fact that the Senate sustained President Reagan's veto is further evidence of a strong national policy to rely on market

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[8] With regard to the pre-emption provision, the House Conference Report stated:

> In general, it is the intent of the conferees that the decision as to when and to what extent to replace market mechanisms with mandatory price and allocation program[s] in the petroleum industry is a Federal decision, and State laws that would usurp this Federal role are hereby preempted.

H.R. Conf. Rep. No. 432, 97th Cong., 2d Sess. ——, *reprinted in* 128 Cong. Rec. H409, H415 (daily ed. Feb. 22, 1982). The House Conference Report also expressly disclaimed any intent "to interfere with the ongoing litigation with respect to State laws, [i.e. *Mobil Oil Corp. v. Tully*]. *Id.* at ——, 128 Cong. Rec. at H415. In the debate over whether to sustain President Reagan's veto of the SPAA, Senators Jackson and McClure recognized a need for a strong pre-emption provision. 128 Cong. Rec. S2729, S2743-44 (daily ed. Mar. 24, 1982). Absent the dicta in *Mobil Oil Corp. v. Tully*, it is doubtful that the members of Congress would have seen such a compelling need for a pre-emption provision.

forces, even in the case of an emergency. The legislative history of the SPAA does not persuade us that Congress did not intend the expiration of federal authority to pre-empt state authority. Rather, it strengthens our conclusion that Congress intended to rely almost exclusively on market forces to determine prices and allocate supplies of petroleum products and to avoid governmental interference with market mechanisms.

The EEPA was enacted in 1982 in response to fears that "a shortage of petroleum products caused by reductions in imports of petroleum products may occur at any time [and that] such a shortage may be sufficiently large to cause severe economic dislocations and hardships, or constitute a serious threat to health, safety, and welfare." S. Rep. No. 393, 97th Cong., 2d Sess. 19, *reprinted in* 1982 U.S. Code Cong. & Admin. News 600, 615. Under the EEPA, the President was to advise Congress on what powers he had under other laws to deal with such emergencies. 42 U.S.C. §§ 6281, 6282. Congress found that "in the event of such a shortage, reliance on free market allocation and pricing of available petroleum product supplies may not be adequate to mitigate the adverse impacts of the shortage." S. Rep. No. 393 at 19, *reprinted in* 1982 U.S. Code Cong. & Admin. News at 615. Congress did not by enactment of the EEPA alter the free market policy it had expressed in the EPCA. Rather, it reiterated that policy.

It is clear that the EEPA's disclaimer, 42 U.S.C. § 6282(c)(2), was intended to address only state and local *emergency* regulations and programs. In explaining the preemption disclaimer Congress stated that its sole purpose was to reassure the states that the "authorities of the states to enact laws in anticipation of, or in response to, energy emergencies remain unaffected by this legislation." H.R. Conf. Rep. No. 663, 97th Cong., 2d Sess. 11, *reprinted in* 1982 U.S. Code Cong. & Admin. News 634, 637. The disclaimer does not evidence a Con-

gressional belief that pre-emption of nonemergency state and local price control authority did not survive the expiration of federal authority. The legislative history of the EEPA demonstrates Congress' continuing efforts to retain an unregulated market and is additional evidence of its previous intent to establish a market free of any government interference.

Nothing in the post-expiration legislative and executive actions persuades us that Congress intended to allow the states to step in and regulate the petroleum products markets after the expiration of federal authority. It is clear that the success or failure of post-EPAA legislation was almost entirely dependent on the resulting degree of interference with a free market. Thus, on this issue of national importance, Congress's initial intent to deregulate the petroleum products market remained in place. The post-expiration actions reinforce our conclusion that by phasing out federal authority to regulate the petroleum products markets Congress intended to establish markets free of any government interference.

IV. *Conclusion*

We hold that the district court correctly concluded that "Regulation No. 45, Amendment 1, Article 4, and the temporary orders of March 26, April 23, and May 20, 1986, are preempted by the federal Congressional delegated purpose to let the market forces be the sovereign in [fixing prices or profit margins of petroleum products]." As in *Transcontinental*, the federal decision to forgo regulation implies "an authoritative federal determination that the area is best left *un*regulated", and Congress did not intend to give the states the power it has denied the federal government. DACO's price controls interfere with and obstruct Congress' goal of letting market forces set prices and allocate petroleum products. Nothing in the post-EPAA legislative or executive actions detracts

from Congress' initial intent to establish markets free of any government interference. The district court properly recognized that only in shortages creating "energy emergencies" do states have the power to regulate petroleum product allocation and prices to ensure health, safety and welfare.

The judgment of the district court is affirmed.

CHRISTENSEN, dissenting.

The majority opinion well states the case and defines the basic issue on the appeal. I fully agree that this Court has jurisdiction to decide the issue for the reasons there stated.

But I can find no real basis either in the text and context of the federal legislation involved, or in developments following its expiration, for holding that by discontinuing federal oil controls Congress intended to continue them in effect indefinitely in curtailment of the ordinary police powers of the states and commonwealth.

There is in my judgment no warrant for us to disregard decisions of this Court and the Supreme Court to the contrary in a case admittedly in point, on the theory that they have been superseded by a later decision which I believe to be clearly distinguishable.

And to affirm in this situation the establishment by the district court's flawed declaratory judgment of a system of state constraints of uncertain extent without the benefit of congressional processing, definition and approval, appears to me not only improvident, but beyond the judicial as distinguished from the legislative function.

No one has suggested, nor could it reasonably be thought, that immediately before adoption of the Economic Stabilization Act of 1971 (ESA) and the Emergency Petroleum Allocation Act of 1973 (EPAA) state regulations affecting the oil industry had been preempted by Congress. It also must be clear that post-expiration legislation actually passed by Congress concerning possible future emergencies, standing alone, had no such effect. The most that can be said about the latter developments is that related comments of individual members throws light upon whether in enacting and amending the EPAA and then permitting it to expire in restoration of a market free from the comprehensive federal controls

theretofore existing, Congress intended also that the market be free from all non-federal controls.

Federal controls, as our decisions demonstrate time and time again, were of emergency origin and sustained and interpreted in light of the emergency. *See*, e.g., *Condor Operating Co. v. Sawhill*, 514 F.2d 351 (TECA), *cert. denied*, 421 U.S. 976 (1975). The very names of the Act and of this Court underscore their transitory nature and purpose. Nowhere in their terms or history was there a suggestion that they were occasioned by, or designed to deal with, problems of state laws, or that there were any such problems except perhaps in the sense that they had proved incapable of coping with emergent shortages.

The congressional findings explaining the basis of the EPAA pointed out that shortages of crude oil, residual fuel oil and refined petroleum products had caused, or were likely to cause, severe economic dislocation and hardship. Congress, accordingly, determined that the best method of averting or minimizing the national threat was to grant the President specific "temporary authority" to deal with the shortages and dislocations. It is paradoxical that expiration of such temporary emergency measures, designed and administered for another purpose, should have the effect of permanently constraining the ordinary exercise of the police powers of state governments which presented no problem within the recognition of Congress except in emergency context and which had nothing to do with the adoption of the Act.

The prevailing opinion cites subsequent congressional support for a "free market," but expressions along this line were focused on freedom from the pervasive federal controls theretofore existing. It is true that some individual members specifically advocated preemption of state regulations while others took the view that there was and should be no such preemption. But we are concerned not with individual beliefs or desires, but an institutional

intent to preempt, which is not proved by the failure of legislation which would have established it, nor by the subsequent enactment of legislation negating it. The record of institutional intent indicates no more.

The Standby Petroleum Allocation Act of 1982 (SPAA) as passed by Congress contained a plain preemption provision. However, Congress failed to override a presidential veto and the act never became law. Thereafter, Congress passed and the President signed the Energy Emergency Preparedness Act (EEPA). 42 U.S.C. pp. 6281-82. Included was this provision:

> No State law or State program in effect on the date of enactment of this part, or which may become effective hereafter, shall be construed to be superseded by any provision of this part.

42 U.S.C. § 6282(c)(2). In a memorandum submitted to Congress, the Attorney General concluded that there was no federal law that preempted stated regulation of petroleum prices or allocations. Attorney General's Memorandum of Law 70-74 (Nov. 24, 1982).

Senator James McClure, Chairman of the Senate Energy Committee, introduced legislation in the 98th Congress to expand the President's powers to deal with an energy emergency. This bill contained an express preemption provision like that of the vetoed SPAA, except that it also would have given the President affirmative authority to exempt from preemption certain state laws and regulations he found not to be in conflict with the federal authority. The administration responded:

> We think this reverses the presumption that ought to apply to State and local laws, and represents an unwarranted departure from principles of Federalism.[1]

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[1] Energy Emergency Preparedness Act Amendments of 1983; and the International Energy Agency Program: Hearing before the Senate Committee on Energy and Natural Resources, 98th Cong., 1st Sess. 612 (Oct. 19, 1983).

This bill died in committee.

I do not find the post-expiration circumstances persuasive of preemption,and would adhere to the view this Court and the Supreme Court expressed in *Mobil Oil Corp. v. Tully*, 653 F.2d 497 (TECA 1981), *vacated and remanded*, 455 U.S. 245 (1982). *See also Mobil Oil Corp. v. Tully*, 499 F.Supp. 888 (N.D.N.Y. 1980), *aff'd*, 653 F.2d 497, *supra*.

In *Tully*, the district court held that because a state antipassthrough rule effectively regulated oil prices, the state statute had been preempted by the EPAA, and issued an injunction permanently enjoining enforcement of that rule. 499 F.Supp. 888. On appeal this Court affirmed, 653 F.2d 497, concluding:

> Any atempt by New York State to affect the structure of prices charged by the oil companies pursuant to federal regulation is barred by conflict with the federal scheme. The EPCA expires by its terms on September 30, 1981. 15 U.S.C. § 760g. In the meantime, the goals to control the impact of OPEC determinations regarding production and prices are viable. At the present time price decontrol has been determined by the President to be the best method to achieve an enunciated goal. The state statute under attack here is an instrument of price control and in conflict with the objectives of the program. *See Ray v. Atlantic Richfield*, 435 U.S. 151, 178, 98 S. Ct. 988, 1004, 55 L. Ed. 2d 179 (1978).
>
> When the statute expires in September 1981, it will signal the end of federal concern in this area. Until that time the state statute is in conflict with the federal statute and regulations.

653 F.2d at 502.

A petition for certiorari was filed with the Supreme Court. On October 13, 1981, two weeks after expiration

of regulatory authority under the EPAA, the Supreme Court asked the parties for their views on whether expiration of the statute mooted the case. The parties responded that there were some pre-expiration questions that survived, such as the extent of the oil companies' tax liability, and therefore the case was not entirely moot. On February 22, 1981, the Supreme Court *per curiam* vacated and remanded the case for reconsideration in light of the expiration of federal price authority under the EPAA. It stated:

> [TECA] affirmed the district court's decision, but noted that the federal statute would expire by its own terms in September 1981, and that expiration of the Act "will signal the end of federal concern in this area." . . .
>
> New York State tax officials then appealed TECA's decision to this Court. We now vacate the judgment and remand the case to TECA for reconsideration in light of the expiration of federal price control authority.
>
> The normal rule in a civil case is that we judge it in accordance with the law as it exists at the time of our decision. . . . The expiration date for the federal statute has come and gone; the only barrier to the enforcement of the antipassthrough provision no longer exists. However, the injunction entered by the district court and affirmed by TECA did not terminate on October 1, 1981, the date that TECA acknowledged to signal the end of federal concern in the area. Thus, in its present form the declaration of the invalidity of the antipassthrough provision and the accompanying injunction against enforcing it have no current validity and must be set aside.

455 U.S. at 246-47. (Citations and footnote omitted).

In a footnote the very point controlling here was emphasized by the Supreme Court:

> To be sure, the expiration provision contained in the EPAA states that "such expiration shall not affect any action or pending proceedings, administrative, civil, or criminal, not finally determined on such date, nor any administrative, civil, or criminal action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration date. 15 U.S.C. § 760g.
>
> Whatever bearing this saving clause may have upon other aspects of the case, it surely cannot mean that, despite the expiration of the preempting federal law, New York should be permanently enjoined from enforcing its antipassthrough provision.

455 U.S. at 247 n.2.

In support of a contrary view, reliance is placed in the prevailing opinion upon statements from the dissent of Justice Stevens in *Tully* and upon the later 5-4 decision in *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 106 S. Ct. 709 (1986). There the issue was the validity of a Mississippi "ratable-take" order requiring an interstate natural gas pipeline to purchase gas proportionally from all the owners of a common gas pool. Prior to 1978, federal jurisdiction over wellhead sales of the natural gas in question had been both plenary and preemptive. In the Natural Gas Policy Act of 1978, however, Congress terminated the authority of the Federal Energy Regulatory Commission to regulate such sales. The state argued that Congress' withdrawal of federal authority cleared the way for the state, in the exercise of its historical police powers, to impose its ratable-take without conflicting with any remaining federal regulatory jurisdiction. The Court concluded that "[i]n light of Congress' intent to move toward a less-regulated national natural gas market, its decision to remove jurisdiction from FERC cannot be interpreted as an invitation to the states to impose additional regulations." 106 S. Ct. at 717.

The majority sees support for their position in the phrasing of its statement of the question, which they quote:

> The proper question in this case is not whether FERC has affirmative regulatory power over wellhead sales of § 107 (high cost) gas, but whether Congress, in revising a comprehensive federal regulatory scheme to give market forces a more significant role in determining the supply, the demand, and the price of natural gas, intended to give the states the power it had denied FERC.

I see in this question quite the opposite, specifying as it does the revision of a comprehensive regulatory scheme rather than its termination, which distinction is the same as the one we and it had already drawn in *Tully* in sustaining the injunction while controls under the EPAA were being phased out, and the expiration of all controls which would "signal the end of federal concern in this area." The Supreme Court's answer to the quoted question makes this determinative distinction even clearer:

> The answer to the latter question must be in the negative. First, when Congress meant to vest additional regulatory authority in the states it did so explicitly. *See* §§ 503(c) and 602(a), 15 U.S.C. §§ 3413(c) and 3432(a). Second, although FERC may now possess less regulatory jurisdiction over the "intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other states," *Northern Natural*, 32 U.S. at 92, than it did under the old regime, that relationship is still a subject of deep federal concern. FERC still must review Transco's pricing practices, even though its review of Transco's purchasing behavior has been circumscribed . . . In light of Congress' intent to move toward a less-regulated national natural gas market, its decision to remove jurisdiction from FERC cannot be interpreted

as an invitation to the states to impose additional regulations.

106 S. Ct. at 717.

The majority sees the possibility of over 50 individual regulatory schemes frustrating Congress's goal of allowing market forces to regulate the supply and price of petroleum products. I apprehend no such problem. Puerto Rico, because of its isolation, and the essentially local nature of its oil business, presents a peculiar situation. The district court found that no state had adopted similar regulations. There are already constitutional limitations on the exercise of their police power, including the Commerce and Due Process clauses, and Congress, of course, has the power to deal with any concern of this nature in light of the Supremacy Clause. Whether this need be done, and if so, when and how, are legislative questions which Congress has not seen fit to act upon.

On the other hand, the problems that will be created by judicially declared preemption in the context of the expired EPAA are far-reaching and intractable, as the courts try to solve them without congressional guidance but in view of the declaratory judgment of the district court herein affirmed.[2]

Since, as we have held, this Court has appellate jurisdiction following the supposed expiration of the EPAA over the present issue of state law preemption, it necessarily will continue to have such jurisdiction of all future appeals involving the extent of that preemption in other cases long after adjudications of the validity and effect of the regulations and programs under ESA and the EPAA have been fully completed.

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[2] While the judgment itself is relatively brief, it permits the implementation of the mentioned local laws only "in accord with federal law as described in this opinion and order" and "as long as the implementation is consistent with our findings and conclusions." (These consist of 38 pages of printed material). 640 F.Supp. 474, 515.

This, also, will be a consequence I think Congress did not intend, as I believe it did not intend from the expiration of those federal controls to constrain ordinary exercise of state police power under the criteria laid down by the district court's declaratory judgment, or at all, in the context of the EPAA.

For the foregoing reasons I feel constrained to dissent.

APPENDIX B

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

No. 1-16

ISLA PETROLEUM CORPORATION, *et al.*,
Plaintiffs-Appellees,

v.

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,
Defendants-Appellants.

Before: CHRISTENSEN, ESTES and JAMESON, Judges.

ORDER

Upon consideration of Appellants' petition for rehearing and suggestion for rehearing *en banc*, it is

ORDERED that said petition for rehearing is DENIED.

It is FURTHER ORDERED that the suggestion for rehearing *en banc* is DENIED. The Court's mandate shall issue seven days from the date of this order—Friday, February 6, 1987.

FOR THE COURT:

DONNA M. BOLD
Clerk

By: /s/ Cynthia Ann Dykes
CYNTHIA ANN DYKES
Chief Deputy Clerk

January 30, 1987

APPENDIX C

[Section 18 of the EPAA, 15 U.S.C.A. § 760g (1976)]

Conversion date of Presidential authority from mandatory to discretionary to promulgate, etc., regulation; termination date of Presidential authority limitations; expiration date of Presidential authority to promulgate, etc., regulation or issue order; effect on pending actions.

Notwithstanding any other provision of this chapter, at midnight on the conclusion of the 40th month in which the amendment under section 757(a) of this title is in effect, the President's authority to promulgate, make effective, and amend a regulation pursuant to section 753(a) of this title shall become discretionary rather than mandatory, and the limitations on the President's authority contained in sections 753(b)(2), 757 and 758 of this title shall terminate. The authority to promulgate and amend any regulation or to issue any order under this chapter shall expire at midnight September 30, 1981, but such expiration shall not affect any action or pending proceedings, administrative, civil, or criminal, not finally determined on such date, nor any administrative, civil, or criminal action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration date.

Pub.L. 93-159, § 18, as added Pub.L. 94-163, Title IV, § 461, Dec. 22, 1975, 89 Stat. 955.

APPENDIX D

[Law No. 228 of 1942, 23 L.P.R.A. § 734 (1964)]

Maximum price and profit regulations; acquisition and disposal of staple commodities; exports; other articles

(a) Whenever in the judgment of the Administrator the price or prices of staple commodities (as these may be determined finally by a public order of the Administrator and for the determination of which the Administrator is hereby authorized) have risen or threaten to rise in a manner inconsistent with the purposes of sections 731-745 of this title, or whenever in the judgment of the Administrator the sales price or prices of staple commodities are out of proportion to the prices prevailing at the supply sources, or to the production costs or costs of raw materials involved, or to the regulating market which normally determines the price of said staple commodities, or whenever in the judgment of the Administrator said sales price or prices determine excessive or above normal profits, or when the sales price or prices do not drop according to the decrease sustained or that may have been sustained by the staple commodities at the supply sources, or according to the regulating market, the Administrator may, by regulation or order, establish such maximum prices or maximum profits as in his judgment may be generally fair and equitable, and likewise he may make such readjustment of maximum prices or maximum profits, previously fixed, as will effectuate the purposes of sections 731-745 of this title; Provided, That the Administrator shall not have power or authority to change or alter by regulation, order or price schedule, the price of any staple commodity that may have been fixed by law. Whenever practicable the Administrator shall, in fixing prices for staple commodities, take into consideration such factors of importance as prevailing wages and salaries, general purchasing power, the requirements of the people of Puerto Rico, the cost of staple

commodities, including taxes thereon, and the cost of distribution and transportation thereof. All regulations or orders issued in consideration of the foregoing provisions of this paragraph shall be accompanied by a statement giving the considerations involved in the issuance thereof. The term "regulation or order", as here used, means a regulation or order of general application and effect. Before issuing any regulation or order in accordance with the foregoing provisions of this paragraph, the Administrator shall, whenever practicable, consult with and seek the advice of representative persons of the industry affected by such regulation or order; Provided, further, That said regulations or orders shall be published by the Administrator in one or more newspapers of general circulation in the Commonwealth; Provided, further, That the Administrator also may, in harmony with the purposes of sections 731-745 of this title, establish minimum price and minimum profit schedules under the same conditions and with the same effect as the maximum price schedules.

(b) Any regulation or order issued under this section may be established in such form and manner as to contain such classifications and differentiations, and provide for such adjustments or reasonable exceptions, as may be necessary and proper in the judgment of the Administrator to effectuate the purposes of sections 731-745 of this title. Any regulation or order issued under this section, which establishes maximum prices, may provide for a maximum price below the price or prices prevailing for the staple commodity involved at the time of the issuance of such regulation or order.

(c) Whenever in the judgment of the Administrator such action should be necessary and proper in order to effectuate the purposes of sections 731-745 of this title, he may regulate by regulation or order, and he may prohibit, such speculative or manipulative practices, including practices relating to changes in the form or

quality of a commodity, or to the hoarding of any staple commodity, as in his judgment are equivalent or lead to price increases inconsistent with the purposes of sections 731-745 of this title; Provided, That in those cases where a merchant or dealer has stocks of staple commodities and refuses to sell them because of his unwillingness to comply with price schedules or any provision of sections 731-745 of this title or of the directives issued by the Administrator by virtue of the powers herein conferred upon him, such merchant or dealer shall be subject to the penalties prescribed by sections 731-745 of this title; Provided, further, That the mere refusal to sell staple commodities carried in stock shall constitute prima facie evidence that the merchant or dealer refused to sell because of his unwillingness to comply with price schedules or with any other provision hereof; Provided, further, That in these cases the Administrator may make use, with regard to such stock, of the power of taking conferred upon him by sections 731-745 of this title.

(d) Whenever the Administrator should determine that the production and possible stocks of staple commodities do not offer guarantees of stability, sufficiency, or reasonable prices in harmony with the needs and the purchasing power of the people, or whenever in any way there should be doubts in the mind of the Administrator as to these matters, or whenever in the judgment of the Administrator such action may be necessary to effectuate the purpose of cheapening the cost of staple commodities which is pursued by sections 731-745 of this title, or any other of the purposes hereof, the Administrator shall have power to purchase, store, freeze, transport, and dispose of said staple commodities in behalf of the Government of Puerto Rico, without need of calling for public bids, and at such prices as in his judgment will fulfill the purposes of sections 731-745 of this title; and he may determine to which persons, and in what quantities and during which period, each commodity declared a staple may be sold, and he may also grant subsidies to domestic

producers under the terms and conditions which in his judgment will attain the purposes of sections 731-745 of this title; Provided, That the Administrator is hereby authorized and empowered to limit or prohibit by rule or directive the export of staple commodities to foreign countries when, in his judgment, the stocks of such commodities are required for local consumption; Provided, That the Administrator shall, in those cases where it may be necessary for the purposes of section 731-745 of this title, have power to construct or acquire facilities for offices, shops, and storage in the name of the Commonwealth of Puerto Rico, in any way, or by any proceedings, including expropriation upon payment of compensation; Provided, further, That whenever in his judgment the public need should so demand, he may distribute gratis among the population, or such part of the population as he may deem fair and advisable to do so, the commodities acquired by him in the name of the Government of Puerto Rico, giving preference to commodities produced in the Commonwealth of Puerto Rico; And provided, further, That for the same considerations hereinabove set forth, the Administrator may take over the stocks of any and all dealers, producers, or growers at the reasonable value thereof, notice of which value shall be given by him to the interested party after making an inventory, whereupon he shall issue the corresponding warrant of payment against the funds appropriated by sections 731-745 of this title. In case any dealer, producer, or grower whose stocks may have been taken over by the Administrator, is not satisfied with the price determined by the latter, such dealer, producer or grower may, within ten (10) days following notice of such appraised valuation, file a petition of review in the Superior Court where the business is situated; Provided, That said review shall be limited to deciding on the value of the stocks. The Administrator may, in any case, sell such staple commodities acquired by such taking, at a reasonable price, to dealers subject to license as provided in

sections 731-745 of this title, or may dispose of them in the same manner as commodities purchased in behalf of the Government of Puerto Rico pursuant to the provisions of this same paragraph; Provided, That shipping companies shall be obliged hereunder to report to the Administrator the consignments of staple commodities imported by them into the island, specifying the natural or artificial persons to whom said commodities are consigned.

(e) The orders, rules and regulations prescribed hereunder may contain all such provisions as the Administrator may deem necessary in order to prevent the evasion thereof.

(f) The Administrator may, when in his opinion it is necessary and proper to effectuate the purposes of sections 731-745 of this title, prohibit by rule or order the transportation, receipt, storage, or sale in Puerto Rico, of articles not staple commodities, or shall determine by rule or order, the quantities of said articles which during any period of time may be transported, received, stored or sold and shall establish a system of permits for the transportation, receipt, storage or sale of said articles.

(g) The courts shall take judicial notice of the regulations, rules, directives, and price schedules heretofore or hereafter approved, issued, or adopted by the Administrator, as well as of the publication thereof required by sections 731-745 of this title.—May 12, 1942, No. 228, p. 1268, § 3; Apr. 29, 1946, No. 493, p. 1474, § 2; Dec. 31, 1946, No. 17, p. 124, §§ 3, 4; May 6, 1950, No. 234, p. 596; Const., art. I, § 1, art. IX, § 4; July 24, 1952, No. 11, p. 30, eff. July 25, 1952.

APPENDIX E

[Law No. 5 of 1973, 3 L.P.R.A. § 341e(a) (1982)]

Powers and faculties of Secretary

In addition to the powers and faculties transferred by this chapter, the Secretary of Consumer Affairs shall have the following powers and faculties:

(a) To regulate, fix, control, freeze and review the prices, profit margins and yield rates on the capital invested at all marketing levels on the goods, products and those services currently and traditionally rendered and charged for by the hour or per unit, which are offered or sold in Puerto Rico, in those cases where such measures are justified to protect the consumer from unjustified raises in prices, to avoid the deterioration of the purchasing power of the consumer, and to protect the economy from inflationary pressures.

APPENDIX F

COMMONWEALTH OF PUERTO RICO
DEPARTMENT OF CONSUMER AFFAIRS
Box 41059—Minillas Station
Santurce, P. R. 00940

PRICE REGULATIONS NO. 45
Amendment 1

SUBJECT: Price Control in the Sale of Gasoline, Kerosene and Diesel Oil at all Levels of Distribution

So as to avoid unjustified raises in the price of gasoline, kerosene and diesel oil, products of prime necessity in our society, it is important for us to adopt the following regulations that will permit an organized transition in the local control of prices once the Federal Controls over petroleum derived products are lifted.

The present ammendment is the culmination of the process of regulating the corresponding Price Regulations No. 45 of August 29, 1975 which was promulgated in accordance with Article 8(b) of Law No. 5 of April 23, 1973. This Ammendment eliminated said Regulations of Prices No. 45, revising and incorporating the disposition of said Regulations.

ARTICLE 1: *Authority*

This regulation is adopted and promulgated in lieu of the power conferred to the Secretary by Law No. 228 of May 12, 1942 and No. 5 of April 23, 1973, as ammended.

ARTICLE 2: *Purpose*

This regulation controls the prices and maximum benefits in the sale of gasoline, kerosene and diesel oil, at all levels of distribution including refineries, establishing the mechanism by which the Secretary can fix and revise

said prices. Also it derogates all previous regulations relative to the matter previously exposed.

ARTICLE 3: *Declaration of Sale Prices*

Once the Federal Price Controls are lifted over the articles here regulated and while the Secretary has not fixed the maximum prices of the product in question, no person can increase the sale price of the product unless he informs by writting to the Secretary the proposed change at least 15 days prior to the date it comes in force.

ARTICLE 4: *Price Orders*

On his own iniciative or by the request of the interested party the Secretary can issue orders fixing and revising prices and the maximum margins of benefits in the sale of the requested products at any distribution level and using the following criteria

a. cost of the crude mixture to the refinery
b. yield of the crude mixture to the refinery
c. demand for the derived products produced by the refinery
d. credits on the sale of products not controlled by this Regulation
e. refining costs
f. cost differential for leaded and unleaded gasolines
g. reasonable benefit to the refiner
h. gross reasonable benefit to the wholesaler and the dealer
    1. reasonable margin for operational costs
    2. reasonable net benefit margin
    3. turnover for the product

4. adjustment to the gross benefit margin considering the turnover of the product

ARTICLE 5: *Price differential for Vieques and Culebra*

By means of an order, the Secretary may establish maximum prices for the products here regulated for Vieques and Culebra. These prices can be different from those prevailing in Puerto Rico taking into consideration the additional transportation and handling from Puerto Rico to said islands.

ARTICLE 6: *Labeling of Prices*

All owners, or operator of gasoline stations should post in the prices of his station a sign, board, blackboard or any similar method, clearly visible and legible from the road where automobiles travel, that shows the sale prices of the articles here regulated. The numbers showing the prices should be of at least 12 inches high, each number that indicates a fraction should be of size no less than half of the whole number.

In all other retail establishments in which these regulated products are sold, a sign should be posted showing in a legible way the sale price of these products, but the size of the sign need not to be as the one indicated before. The sign should be posted in a clearly visible place to the consumers that come to buy these products.

The price orders which are emitted by this regulation can specify the form of posting the maximum prices.

ARTICLE 7: *Methods of Delivery*

It is prohibited to change the usual methods of delivery, terms, discount, concessions or services supplied in the sale of the products here regulated, if the change will result in a sale price or ma:gin of benefit that exceeds the established maximum.

ARTICLE 8: *Records*

Every person who sells, distribute or manufactures the regulated products, must prepare and make available to the Secretary for examination, upon request all records necessary to demonstrate the manufacturing costs of and/or the prices charged for and paid for the regulated products. Said records must be kept for the period of one year after each transaction.

ARTICLE 9: *Reports*

The Secretary has the right to request at any time and from any person who manufactures, distributes or sells the regulated products, all data and information which may be pertinent and necessary to attain the purposes of this regulation.

ARTICLE 10: *Evasions*

Any direct or indirect method or mechanism to obtain a price or margin of benefits in excess to the established maximum, as well as the hidding or alteration of any records, documents or informationrequired under the Regulation, constitute violation to the latter.

ARTICLE 11: *Interpretations*

Any interested party has the right to request an interpretation to any part of the Regulation from the Secretary and provides that any person violating the Regulation will be subject to the Administrative Sanctions and penalties provided by Law.

ARTICLE 12: *Exception*

In case that any disposition of this regulation is declared void by some Court, said declaration will not affect in any way the rest of the disposition of this regulation that will continue to be in force.

ARTICLE 13: *Violations and Sanctions*

No person will perform prohibited acts or will omit any act required by this regulation, nor will offer, solicit, intent nor will agree to make or omit any of such acts. No person will charge a price or obtain a margin of benefit that exceeds the maximum established by the Secretary.

Any person that violates the dispositions of this regulation or orders or resolution emitted will be subject to the Administrative sanctions and penalties stated in Law No. 228 of May 12, 1942 and No. 5 of April 23, 1973 as amended.

ARTICLE 14: *Discrepancies between Spanish and English text*

In case of any discrepancy between the english and spanish texts, the spanish version will prevail.

ARTICLE 15: *Definitions*

a. Secretary—Means Secretary of Consumer Affairs

b. Department—Means Department of Consumer Affairs

c. Person—Includes the natural juridical or any corporation, enterprise society, association or any other person or organized group of persons and legal successors mandatories, mediators agents or representatives of these mentioned.

d. Records—Accounting Books, Price lists, invoices, orders, tally sheets, contracts, receipts, Bill of Ladings and others.

ARTICLE 16: *Derogarions*

Hereby the following are derogated: Order P-18 by the Secretary of August 17, 1973. Ammendment No. 1 to said

order radicated November 9, 1973, Ammendment No. 2 to said order and radicated December 11, 1973 and Addendum to Ammendment No. 2 also radicated December 11, 1973.

Hereby also derogated Price Regulation No. 45 of August 29, 1975 and Order P-16 of March 27, 1973.

ARTICLE 17: *Effective Date*

This regulation will be in effect the same date of its radication with the State Department in accordance with the dispositions of Laws No. 112 of June 30, 1957 and No. 5 of April 23, 1973 respectively as ammended.

At San Juan, Puerto Rico, the 23rd. day of July of 1976.

FEDERICO HERNANDEZ DENTON
Secretary

Radicated: July 23, 1976.

Effective: July 23, 1976.

APPENDIX G

COMMONWEALTH OF PUERTO RICO
DEPARTMENT OF CONSUMER AFFAIRS

DEPARTMENT OF CONSUMER AFFAIRS

v.

CARIBBEAN GULF REFINING CORP.

ORDER

WHEREFORE, the above-captioned Corporation is dedicated to the distribution and sale of gasoline.

WHEREFORE, Article 3 of Price Regulation Number 45, Amendment 1, dated June 21, 1976, regarding the control of prices in the sale of gasoline, kerosene and diesel oil at all the distribution levels, issued by the Authority of Act Number 228 of May 12, 1942, and Act Number 5 of April 23, 1973, as amended, provide: "Once the federal price controls over any other product regulated herein have ceased, and while the Secretary has not set the maximum prices for the product in question, no person will be able to increase the sale price of the product unless he informs the Secretary of the proposed change in writing, at least fifteen (15) days before the same is in effect.

WHEREFORE, Article 4 of the aforementioned Regulation provides: "At his own initiative or at the request of an interested party, the Secretary can issue orders setting and revising the maximum prices and profit margins in the sale of the products regulated herein at all or at whatever distribution levels and in accordance to the following criteria:

a. Cost of the mixture of crude to the refinery.

b. Yield of the mixture of crude to the refinery.

c. Demand for derivative products produced by the refinery.

d. Credits for the sale of products not controlled by this Regulation.

e. Refining costs.

f. Cost differential between the leaded and unleaded gasoline.

g. Reasonable profit for the refiner.

h. Reasonable gross profit for the wholesaler and the retailer.

1. Reasonable margin for operation expenses.

2. Reasonable net profit margin.

3. Product turnover.

4. Adjustment to the gross profit margin in consideration of the product's movement.

WHEREFORE, Article 11 of the aforementioned Regulation allows the Secretary of Consumer Affairs to issue official interpretations of this Regulation.

WHEREFORE, the Secretary of Consumer Affairs has interpreted that any increase in the sale prices must comply with the 15 day pre-pre-notice requirement ordered by Article 3 of the aforementioned Regulation. To increase a sale price reduced by a temporary discount requires a notice to the Department with fifteen (15) days of advance notice.

WHEREFORE, Article 6 of Act Number 5 of April 23, 1973, as amended, provides in part: "In addition to the powers and faculties transferred by the present Act, the Secretary of Consumer Affairs shall have the following powers and faculties transferred by the present Act, the Secretary of Consumer Affairs shall have the following powers and faculties:

(a) To regulate, set, control, freeze and revise the prices, profit margins, and the rates of yield on capital invested at all the marketing levels, on the articles, products and those services which are usually and traditionally rendered and which are charged for per hour or per unit, which are offered or sold in Puerto Rico, in those cases in which those measures are justified to protect the consumer unjustified increases in the prices, to prevent the deterioration of the consumer's purchasing power, and to protect the economy from inflationary pressures.

(h) To issue orders (subpoena) to compel the appearance of witnesses and the production of documents and/or information.

(s) In coordination with the other Agencies and Departments of the Commonwealth of Puerto Rico, to promote and watch for the compliance of all the laws, rules, regulations and orders which affect the consumers' interests.

(u) To require that those records and other documents which may be necessary to put the provisions of this law into legal force be kept and maintained.

(w) To inspect records, inventories, documents and physical facilities of persons or entities subject to regulation under the provisions of this Act."

WHEREFORE, Article 18 of the aforementioned Act Number 5 provides: "The Secretary shall have the faculty to impose fines up to a maximum of five thousand (5,000) dollars.

The Secretary may impose fines for violations to the provisions of this Act, the laws administered by the Department or the regulations or orders issued by the Department. Each day in which the same violation is incurred in shall be considered as a separate violation."

WHEREFORE, by virtue of the aforementioned legal provisions, the Secretary of Consumer Affairs issues the following:

ORDER

Let the above-captioned Corporation be informed about the interpretation given by the Secretary of Consumer Affairs to Article 3 of Price Regulation Number 45, Amendment 1.

The above-captioned corporation must notify the Department of Consumer Affairs about any proposed price increase in the sale of gasoline at least fifteen (15) days before the date on which it is expected to be put into effect.

Any price increase notice which the above-captioned corporation may have notified its clients, without having previously complied with the prior notice requirement, lacks force and validity. In such event, the above-captioned corporation shall cease and desist from the collection of the aforementioned increase.

GIVEN: In San Juan, Puerto Rico, on March 26, 1986.

(Signed)
Pedro Ortiz Alvarez
Secretary

COMMONWEALTH OF PUERTO RICO
DEPARTMENT OF CONSUMER AFFAIRS

IN THE MATTER OF WHOLESALERS
GASOLINE DISTRIBUTORS

TEMPORARY ORDER FOR MAXIMUM PRICES AND PROFIT MARGINS

On March 26, 1986 the Secretary of Consumer Affairs issued an Order advising the effectiveness of Price Regulation No. 45, Amendment 1 and for the need that any increase in the sale price to retailers be previously notified to the Department of Consumer Affairs.

The refining companies producing gasoline in Puerto Rico requested authorization to transfer to the wholesaler the revenue they have to pay pursuant to Law No. 5 of March 18, 1986. This Department has authorized this transfer. The revenue that may be transferred to the wholesalers will be the one that really encumbers the raw material used to elaborate the gasoline. The refining companies must grant to the wholesalers or distributors credits to compensate the excess invoiced due to the revenue. In the event that previous invoices were collected, which included charges for the revenue not attributed to the raw material used to process the gasoline sold, the company must return the profit received from this concept.

At the moment the revenue becomes effective most of the wholesaler distributors had not transferred to their clients the totality of the reduction in the price of gasoline caused by the reduction in the price of oil. This Department has sufficient basis to conclude, at least for the quarter prior to the approval of Law No. 5, that the

wholesalers had profits substantially over the margins considered reasonable for that industry.

As of today the maximum price at which the gasoline may be sold to the retailers will not exceed that offered by the company to its clients on March 31, 1986. It will not be possible to increase the price to the retailers without the expressed permission of the Secretary of Consumer Affairs. The retailers will not have to pay an increase which is not expressly authorized. Any loss produced by the denial of the authorization will be charged to the profit obtained in the first quarter of this year.

It will not be necessary, for the time being, to make adjustments for temperature.

The Secretary is conscious of allegations made in regards to the increase in the price of gasoline in the United States market and the recent increase in the price of crude oil. He also considers that the reasonability of the gross profit margin of 8.6 cents that we have until now considered appropriate and which in practice has been extensively exceeded, should be evaluated. Therefore, you are notified of a public hearing to be held on May 12, 1986, at 10:00 a.m. in the Félix Mejías Room, 4th Floor, North Building, Minillas Governmental Center in Santurce. We suggest that those interested in participating to refer to the following topics:

1. The desirability of having a permissible gross margin and how it should be determined.
2. The action that the Department should take in regards to violations of the margins established, carried out during extensive periods of time.
3. The gross profit margins tolerated in the United States and the gross margin that the company where no regulation exists, really has.

4. The reason, if any, to allow higher margins in Puerto Rico.

This Order will be in effect on the same day of its publication in a newspaper of major circulation in Puerto Rico.

Issued in San Juan, Puerto Rico, April 23, 1986.

(Signed) Pedro Ortiz Alvarez
Secretary

CERTIFICATION

True and correct translation
Prepared and submitted by:

/s/ Judia Quillés
U.S. Government Certified
Interpreter-Translator

COMMONWEALTH OF PUERTO RICO
DEPARTMENT OF CONSUMER AFFAIRS
P.O. BOX 41059, MINILLAS STATION
SANTURCE, PUERTO RICO 00940

SECOND TEMPORARY RESOLUTION AND ORDER ON GASOLINE PRICES AND GROSS BENEFIT MARGINS

On April 23, 1986, the Department of Consumer Affairs issued two Resolutions on gasoline prices. Together, these Resolutions established objective methods for controlling prices of sales by refiners to wholesalers, reminding gasoline wholesalers that they could not make a gross profit margin in excess of 8.6 cents per gallon, allowing refiners to pass through to the wholesalers the full effect of the excise tax levied by Law No. 5 of March 18, 1986, and establishing maximum prices in sales by wholesalers to retailers at the level existing on March 31, 1986.

The Department's determinations were based on the following facts:

1. When federal controls on gasoline were eliminated by Executive Order of the President of the United States on January 28, 1981, DOCA immediately put into effect all of Regulation No. 45, Amendment 1, of 1976 by requiring wholesalers and retailers to provide advance notice to DOCA of and to justify all price increases, and establishing 8.6 cents per gallon for wholesalers and 17.7 cents per gallon for retailers as the maximum gross margins against which all price changes would be judged. These maximum margin levels were the same as those authorized by federal regulations when those regulations ended.
2. There is abundant evidence that both wholesalers and retailers were on notice of and recognized

these rules, including the gross margin limitations, and acted pursuant to them.

3. In recent months, the large wholesalers abandoned all adherence to the reference margin of 8.6 cents per gallon. The problem reached a peak during the first calendar quarter of the present year, when the majority of wholesalers charged prices that, in some cases, tripled the reference profit margin and doubled those that they obtained in 1985. This situation was brought about by the substantial reduction in the cost of gasoline to the wholesalers, which cost reductions were generally not passed on by the wholesalers to their customers.

4. Said Law No. 5 was passed with the purpose of retrieving for the people of Puerto Rico a part of those excess profits. The legislative intent for the excise tax is that it should be paid by the importers and distributors that were not passing cost decreases on to the consumers. It was one of the purposes of the April 23 Resolutions to carry out this legislative intent.

5. The wholesalers have never made any attempt to justify to DOCA the higher profit margins they were realizing in recent months. To the contrary, the available evidence indicates that such margins were highly inappropriate. In some cases they were five to six times the gross margins that had been earned by the same companies in 1982-83. Inasmuch as inflation and interest rates in Puerto Rico have declined in the intervening period, there is little likelihood that these margin increases could be justified by cost increases. Further, the margins of these companies substantially exceeded the margins that are being earned at the same level of distribution in the

United States. No effort has been made by the wholesalers to explain these discrepancies.

When we issued the April 23 Resolutions, we intended that their duration be brief, but at the same time we wanted to make sure that the people of Puerto Rico would not incur any of the affects of the new excise tax and that wholesalers' margins would be returned to more reasonable levels. We also expressed our concern respecting the fact that wholesalers were obtaining margins in excess of those authorized, and we announced public hearings to receive guidance on the necessity of any further adjustments in our Orders to take into account the needs of the wholesalers, among others. Unfortunately, wholesalers denied us the opportunity to learn their views on this point, since they boycotted the public hearings held on May 12, 1986.

After the Order of April 23, 1986 was issued, gasoline and petroleum prices in the U.S. market increased. These market prices serve as indicators that determine gasoline prices in Puerto Rico due to four principal reasons, to wit: (1) delivery contracts use those markets as reference points; (2) imported gasoline, which exceeds 25% of local consumption, is purchased in relation to prices prevailing on the Gulf Coast of the U.S.; (3) a substantial part of gasoline transactions in Puerto Rico are based on exchanges made in the U.S.; and (4) if prices paid in Puerto Rico are less than those prevailing in the U.S., probably local producers would prefer to sell their gasoline outside Puerto Rico. Even though some wholesalers have not responded to recent DOCA requests for precise information, DOCA will take notice of the fact that these movements in the markets have no doubt meant significant increases since March 31 in the costs being paid by wholesalers.

Because of these increases, the majority of wholesalers appear presently to be selling at or near their cost. In this manner, they have already returned a portion of

what they overcharged during the first quarter of the year. For some companies, however, there is still a part of said overcharge for which the consuming public has not been compensated, and therefore, for those companies, their prices must continue to reflect a refund of the undue profits they received in the first quarter. Nevertheless, because it is not the intention of this Department to require any company to operate with a negative benefit margin, circumstances justify changes to our Resolutions of April 23, 1986.

General price increases in the gasoline and crude petroleum markets, which have increased wholesalers' costs, could justify some small price increase to the retailer, even if wholesalers' margins are held to reasonable levels. But in order to stabilize the market and to prevent consumers from feeling any undue effects, we have activated the "Fondo de Articulos de Primera Necesidad" to effect a temporary adjustment to protect consumers.

In accordance with the aforementioned reasons, we issue the following:

TEMPORARY ORDER

1. Wholesalers not covered by paragraph 2 below may sell their gasoline to retailers for the price that results by adding to their cost of gasoline a gross profit margin of 8.6 cents per gallon, which is the maximum gross profit margin that a wholesaler can make. If any such wholesalers import gasoline to sell in Puerto Rico, then they shall receive a credit of ten (10) cents per gallon for gasoline sold starting May 21, 1986, to be paid by the Department of Consumer Affiairs under the authority vested upon it by Article 3 of Law No. 228 of May 12, 1942, as amended. These wholesalers may sell at a price that results by adding 8.6 cents per gallon to the cost of purchasing the product after subtracting the credit being paid by DOCA. DOCA has determined on the basis of available information that the wholesalers covered, at this time, by this paragraph are Cia. Petrolera Caribe Inc., Tenoco Oil Co., Inc. and Distribuidora de Gasolina el Coqui, Inc.

2. Wholesalers that had gross profit margins on average for all gasoline sold during the first quarter of this year in excess of 8.6 cents per gallon and who have not already "repaid" the amount of such excess in spite of receiving gross margins of less than 8.6 cents per gallon through the operation of the Order of April 23, 1986, may sell their gasoline to retailers for the price that results by adding to the cost of purchase of gasoline a gross benefit margin of 3.6 cents per gallon. If any such wholesalers who import gasoline to sell in Puerto Rico, then they shall receive a credit of five (5) cents per gallon, to be paid by the Department of Consumer Affairs for gasoline sold starting May 21, 1986. These wholesalers may sell at the price that results by adding 3.6 cents per gallon to their cost, after subtracting the credit being paid by DOCA. DOCA has determined on the basis of available information that the wholesalers initially covered by this paragraph, at this time, are Texaco Puerto Rico, Inc.; The Shell Company (Puerto Rico) Limited and Mobil Oil Caribe, Inc.; Esso Standard Oil, Co. (P.R.); Caribbean Gulf Refining Corporation; Isla Petroleum Corporation. Notwithstanding, any such wholesaler may petition to be covered by paragraph 1 above to the extent that it can demonstrate to the satisfaction of DOCA that it has repaid its excess gross margin in the manner described above.

3. Refineries may sell to wholesalers according to the formula expressed and authorized in the Order of April 23, 1986 for Phillips Puerto Rico Core and Caribbean Gulf Refining Corporation. However, they must give a ten (10) cents per gallon credit on the price charged to those wholesalers covered by paragraph 1 above and a five (5) cents per gallon credit on the price charged to those wholesalers covered by paragraph 2 above. This

credit shall be taken against the price then in effect, provided such price is not less than the price that was in effect on Friday, April 25, 1986. If the then-prevailing price falls below the price in effect on April 25, 1986, the credit shall be reduced by a corresponding amount, but not less than zero. This credit shall be reimbursed by the Department of Consumer Affairs and shall be given for all gasoline delivered, starting May 21, 1986. If such gasoline has already been paid for and this is demonstrated to the satisfaction of DOCA, he shall give said credit to the wholesaler.

4. The wholesalers included in paragraphs 1 and 2 who have a stock of gasoline produced in Puerto Rico and have not received on such gasoline the benefit of either the ten or five cent credits mentioned in paragraph 3, shall subtract ten or five cents, as the case may be, from their real cost of gasoline, before adding their gross profit margin of 8.6 or 3.6 cents per gallon, as appropriate. This credit shall be reimbursed to such wholesalers by the Department of Consumer Affiairs, once the extent of said stock and cost reductions are demonstrated to the satisfaction of this Department.

5. Retailers may have a gross profit margin of 17.7 cents per gallon, including both cash and credit sales.

6. The Temporary Resolution and Order on Gasoline Prices and Gross Benefit Margins of April 23, 1986 applicable to wholesalers is hereby rescinded.

In addition to having the favorable result of causing the return of undue profits earned by some companies in the first calendar quarter of this year, the distinction being made between the wholesalers covered by paragraph 1 and those covered by paragraph 2 will also help preserve the competitive viability of the non-branded, independent wholesalers that have historically provided the valuable function of some price discipline to the wholesale gasoline market in Puerto Rico. In order to maintain effectively their share of the market, such firms typically price their product several cents below the prices being charged by the major branded marketers. The wholesalers covered by paragraph 2 include all of the major wholesalers, while all of the smaller wholesalers except one did not have overcharges in the first calendar quarter that remain unpaid, and, therefore, are covered by paragraph 1. Furthermore, the information available to DOCA indicates that the one small wholesaler now covered by paragraph 2 will soon work off its excess margins earned in the first calendar quarter, if it has not done so already, and will shift to coverage under paragraph 1. Since all of the smaller firms must generally price below the price leaders and are therefore not affected directly by margin controls, the distinction made herein should allow them to maintain their normal competitive relationship to the larger companies and still earn their historical margins.

The credits to be paid by DOCA pursuant to the preceding paragraphs are temporary only, for the purpose of stabilizing product prices to consumers while the market is adjusting to these changes. The credits will be discontinued at such time as DOCA determines that they are no longer required.

The foregoing action is being taken immediately for the purpose of making appropriate adjustments to the April 23 orders. The situation will be under continuous review, and further adjustments will be made as circumstances warrant. In order to determine as promptly as possible the effects of this Temporary Order, and to receive information that will assist DOCA in its ultimate objective of allowing prices to be fully regulated by competitive forces, DOCA is hereby establishing the following processes:

1. Companies that are adversely affected by this Order may file promptly with DOCA a request for special

relief from this Temporary Order. A hearing at which the affected company can present its case for such special relief will be convened within five (5) business days of the receipt of that request. A company seeking such relieve shall submit to DOCA at such hearing detailed evidence of its costs, including operating costs, and such other information as it wishes to present in support of its request. DOCA will establish appropriate procedures to preserve the confidentiality of any information submitted by the companies that is proprietary in nature. Any company covered by paragraph 2 above that submits a request for special relief under this paragraph shall submit with its request computations showing the extent to which it charged its customers during the first calendar quarter of 1986 prices that resulted in a gross benefit margin in excess of 8.6 cents per gallon and the extent to which that excess has been offset in the current calendar quarter.

2. A public hearing will be convened by DOCA on June 2, 1986, at our main office located in the Minillas Government Center, North Building, de Diego Avenue, Santurce, P.R. to receive comments from all interested persons on the appropriateness of the Temporary Order and any further modifications that should be made to return to a situation where primary reliance can be placed on competitive market forces to maintain fair margins at all levels of distribution and fair prices for the consumer. In particular, the companies that are directly affected by this Temporary Order, as well as all other members of the public, are requested to address the following questions:

(a) whether operating costs of wholesalers have increased significantly since 1981, when federal controls ended and the reference margin of 8.6 cents per gallon was adopted by DOCA, and, if so, the extent of and the reasons for such increases;

(b) whether there are significant differences between the operating costs of wholesalers in Puerto Rico and

wholesalers in the U.S. and, if so, the reasons for those differences;

(c) the reasons why wholesalers' margin increased substantially in the first calendar quarter of 1986 as their costs decreased and the measures, if any, that should be adopted by DOCA under existing law to prevent any recurrence of this circumstance in the future;

(d) the manner in which, and the schedule on which, changes should be made to this Temporary Order in order to achieve the long term objectives of:

(1) Obtaining restitution from the companies for unreasonable profits that they received in the first calendar quarter;

(2) providing price stability to Puerto Rico's consumers;

(3) providing vigorous competition among all wholesalers in Puerto Rico, including maintenance of the competitive viability of the small wholesaler; and

(4) returning, as quickly as possible, to primary reliance on competitive market forces to regulate gasoline markets in Puerto Rico.

The hearing officer assigned to preside at this public hearing will issue appropriate procedural rules to provide for the orderly receipt of evidence and to assure that all interested persons will be heard. To insure the latter, all persons wishing to be heard shall submit their names and all written material they wish to be considered to DOCA at the Secretary's office, at least 24 hours prior to the public hearing.

This Second Temporary Resolution and Order shall be effective on May 21, 1986 after publication in a newspaper of general circulation in Puerto Rico.

In San Juan, Puerto Rico, on May 20, 1986.

/s/ Pedro Ortiz Alvarez
PEDRO ORTIZ ALVAREZ
Secretary

APPENDIX H

[23 L.P.R.A. § 1131 (Supp. 1983)]

Statement of public interest

By these presents the gasoline industry in all its phases is declared as one vested with public interest. To such effects, the Department of Justice, the Department of Consumer Affairs, the Department of Commerce, the Public Service Commission, the Planning Board and the Regulations and Permits Administration are empowered to adopt and implement all those programs and regulations that are needed to make the purposes of this subchapter effective. The regulations shall be adopted and promulgated after consulting all the interested parties, and in agreement with the procedures provided in their respective organic acts.—June 23, 1978, No. 73, p. 244, § 2, eff. June 23, 1978.

Statement of motives. Act June 23, 1978, No. 73, contained a statement of motives. See Laws of Puerto Rico 1978, p. 244.

Savings clause. Section 7 of the Act June 23, 1978, No. 73, provided: "If any provision of this act [this subchapter] or the application of the same to any person or circumstance is declared void, the rest of the act and the application of said provision to other persons or circumstances shall not be affected thereby."

Legislative determinations. Section 1 of Act June 23, 1978, No. 73, provided:

"(a) There is no real competition at the refining and retail and wholesale distribution levels in the gasoline industry, nor are there conditions that propitiate the development of such competition. On the contrary, there are some contractual practices and relationships as well as manifest trends that indicate the existence of an

increasing control of the market by specific sectors of the industry, through the operation of factors that do not respond to the forces of free competition.

"(b) The absence of active and fair competition in the gasoline market threatens to create a disruptive situation that endangers the normal development of commerce and the flow of fuels needed for the collective and economic life of the country.

"(c) There is, therefore, an urgent need to take measures that would guarantee the stability of free trade and the continuous availability and accessibility of the fuels that are essential for the normal and efficient functioning of our everyday life as a people."

APPENDIX I

Commonwealth of Puerto Rico
ECONOMIC STABILIZATION ADMINISTRATION
P. O. Box 4183
San Juan, Puerto Rico

PRICE REGULATION NO. 4

Subject: Establishment of Ceiling Prices for the Sale in Puerto Rico of Gasoline, Kerosene, Fuel Oil and Diesel or Gas Oil.

This regulation establishes methods for the determination of ceiling prices for the sale of gasoline at the different levels of distribution and for kerosene, fuel oil and diesel or gas oil at the import level.

Almost all supplies of gasoline and other petroleum by-products come to Puerto Rico from the continental United States. Recent increases in prices of these products occurred in the point of origin. These increases have been questioned by Congress considering them unjustified. In Puerto Rico these increases have reflected in higher prices to the consumers, specially in gasoline. In the sale of this product the import companies increased their margin of profit over those they had during the Federal Price Control Regulation. The increase in the margins of profit is considered unjustified because the increase in volume of sales has compensated to a great extent, or in total, the increases in operating costs. The margins of profit authorized by this regulation are considered just and fair as they are the ones traditionally received by the import companies and distributors of the petroleum products covered by this regulation, considering the increase in volume of sales occurred during the last years.

The Administrator of the Economic Stabilization Administration, aware of the importance of the petroleum

products covered by this regulation in the development and economic success of the Commonwealth of Puerto Rico, has decided to establish control over the ceiling prices of these products as provided in this regulation. The importance of these products in our commercial, agricultural and industrial life makes of them staple commodities.

This regulation is issued under the authority conferred to the Administrator of the Economic Stabilization Administration by Law 228 of May 12, 1942, as amended, and Law 97 of June, 1953.

Section 1—*What this regulation does*

(a) This regulation establishes methods for the determination of ceiling prices for the sale of gasoline at the different levels of distribution and for kerosene, fuel oil and diesel oil at the import's level only. Prices lower than the ceiling prices authorized under this regulation may be charged, paid or offered.

Section 2—*Basic Period*

(a) For the purpose of this regulation, it is known as *basic period* the period from December 19, 1956, to January 25, 1951, both dates inclusive.

Section 3—*Ceiling Prices for Importers*

(a) If you are an importer, your ceiling price for the sale to the different purchasers of products covered by this regulation shall be direct cost of the product (as defined in paragraph (a) of Section 2 of this regulation) plus the margin of profit that you used to obtain in your sales to such class of purchasers, during the *basic period.*

(b) If you did not sell during the basic period any product covered by this regulation, you shall file a request with the Economic Stabilization Administration for the establishment of a ceiling price.

Until you receive written notice of the establishment of your ceiling price, you shall not make sales of that product.

Section 4—*Transactions with sources of supply that are not the customary ones*

(a) If you are an importer, you shall not take into consideration, to determine your ceiling price, purchases or sales and loans transactions that have been effected with any source of supply that is not one from which you customarily receive supplies.

Section 5—*Ceiling Price for inventories at different costs*

(a) If you are an importer and have inventories of products covered by this regulation at different costs, you shall determine the ceiling price of those inventories using the same method that you used in the basic period to determine your margin of profit for such period. This method must be notified to this Administration as required by Section 10 (b) of this regulation.

(b) If you are a retailer and have inventories of the products covered by this regulation at different costs, the cost of the last shipment of the product received shall be used as the cost to establish the price to all the inventories of such product.

Section 6—*Determination of ceiling prices when dealing with fractions*

(a) When determining your ceiling prices, you shall round the fractions to the same decimal point that you usually rounded them during the basic period.

Section 7—*Ceiling price at retail*

(a) If you are a retailer, your ceiling price for the sale of gasoline will be your net invoice cost, plus $0.03 per gallon.

Section 8—*Delivery methods and sale terms*

(a) It is prohibited to change the customary methods used during the basic period of delivery, terms, discounts, concessions, or services furnished in the sale of the products covered by this regulation, if the change results in a higher selling price to the supplier.

Section 9—*Clause for adjustment of ceiling prices*

(a) This section allows you to apply for an increase in the margin of profit of the basic period. You must prove that your operation expenses have increased after the basic period. The application must be accompanied with the last four years Profit and Loss Statements. The Economic Stabilization Administration reserves the right to exclude or reduce any item of the expenses considered unreasonable or excessive, such as:

1. Abnormal or temporary elements.
2. Any depreciation in excess of the normal depreciation.
3. Any item that constitutes a split of profits, such as bonus, excessive salaries, etc.
4. Excessive gifts.
5. Any expense or disbursement excessive and unreasonable.

Section 10—*Records-keeping and reports by the importers*

(a) *Record-keeping*

1. You shall prepare and maintain, for inspection by the Economic Stabilization Administration, for a period of one year, all the records and documents used in the determination of your ceiling prices.

2. You also shall prepare and keep all the records showing the different price differentials, discounts, terms

and conditions of sale and delivery for the different types of purchasers in effect during the basic periods.

(b) *Reports*

1. Within the first five days (5) of effectiveness of this regulation, you must file in the Economic Stabilization Administration the method used during the basic period to appraise your inventories and that served as base to determine your direct cost.

2. Within the first five (5) days of effectiveness of this regulation, you must file the information as to the decimal point you customarily rounded up the fractions during the basic period.

3. Within the first five (5) days of arrival of a shipment of products covered by this regulation, you must file in the Economic Stabilization Administration the following information:

(a) Amount and a detail of the direct cost of the shipment.

(b) Date received and name of the thank-ship that brought the product.

(c) Last cost. This cost includes the inventories and the last shipment.

(d) Ceiling price for sale and date when it will be in effect.

Section 11—*Definitions and explanations*

(a) Direct Cost—this term means the sum of the following amounts:

1. Net Invoice Cost (as defined in paragraph (b) of this section).

2. Charges for freight, insurance and warehousing. Do not include local freight.

3. Taxes paid by you.

(b) Net Invoice Cost—this term refers to your invoice cost, less any discount that you have taken or could have taken except the discount for prompt payment.

(c) You—the pronoun "you" includes any individual, corporation, society, association, or any other organized group of persons or legal successors or representatives of the same, the United States of America, and the Commonwealth of Puerto Rico or any other government or its subdivisions or political agencies.

(d) Kerosene—it is understood by kerosene the petroleum by-product commonly known as "gas",

(e) Retailer—means the person that sells to the ultimate consumer or to a person that purchases for the ultimate consumer. Ex: gas stations

(f) Records—this term means books of accounts, price lists, bills of sales, orders, vouchers, contracts, receipts, invoices, bills of lading, and other papers and documents.

Section 12—*Interpretations.*

If you wish an official interpretation of this regulation you must write to the Legal Advisor of the Economic Stabilization Administration of Puerto Rico. Any action taken by you relying upon and conforming to a written official interpretation, will constitute action in good faith.

Section 13—*Prohibitions and Violations.*

(a) You shall not commit an act prohibited, nor omit any act required by this regulation, nor offer, solicit, intend or agree to do or omit any such acts. You shall nor purchase or sell, in the normal and due course of business, irrespective of any contract or obligation made prior to the issuance of this regulation, at a price above the ceiling prices established by this regulation. And you shall make, keep, and hold faithful and accurate records.

(b) If you violate any provision of this regulation, you shall be subject to the criminal sanctions and other penalties of Law 228 of May 12, 1942, as amended.

Section 14—*Evasions*

(a) Any means or device which results in obtaining indirectly a higher price than those authorized by this regulation, or in concealing or misrepresenting information about which this regulation requires records to be kept, is a violation to this regulation.

Section 15—*Enactment*

(a) This regulation shall become effective the first day of October, 1953.

Approved today, September 24, 1953, in San Juan, Puerto Rico

(Signed) Félix Mejías
Administrator

Translated from the Spanish original

APPENDIX J

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
Washington, D.C. 20543

October 13, 1981

MEMORANDUM

To: All Counsel of Record

From: Alexander L. Stevas, Clerk

Re: James N. Tully, Jr., et al. v. New England Petroleum Corporation, et al.
No. 81-96

The opinion of the Temporary Emergency Court of Appeals in this case stated that the Energy Policy and Conservation Act "expires by its own terms on September 30, 1981," and that the expiration of the Act "will signal the end of federal concern in this area." The parties are requested to address whether the expiration referred to by the TECA will moot this case, affect the jurisdiction of this Court to review the judgment of the TECA, or otherwise bear on whether the Court should undertake plenary review of that judgment.

Ten copies of your response is to be received by me on or before 4:00 p.m. November 9, 1981.

cc: Thomas R. Trowbridge, III, Esq.
Donovan Leisure Newton & Irvine
30 Rockefeller Plaza
New York, NY 10112

Stanley D. Robinson, Esq.
Kaye, Scholer, Pierman, Hays & Handler
425 Park Avenue
New York, NY 10022

James C. Blair, Esq.
Cleary, Gottlieb, Steen & Hamilton
One State Street Plaza
New York, NY 10004

Shirley Adelson Siegel, Esq.
Solicitor General
Dept. of Law State
State Capitol
Albany, NY 12224

George Weisz, Esq.
Cleary, Gottlieb, Steen & Hamilton
One State Street Plaza
New York, NY 10004

Richard D. Friedman
Paul Weiss Rifkind Wharton & Garrison
345 Park Avenue
New York, NY 10154

SUPPLEMENTAL APPENDIX

FILED
MAR 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1406

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,
Petitioners,

v.

ISLA PETROLEUM CORPORATION, *et al.*,
Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

LYNN R. COLEMAN *
DOUGLAS G. ROBINSON
MATTHEW W.S. ESTES
WILLIAM S. SCHERMAN
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
919 Eighteenth Street, N.W.
Washington, D.C. 20006
(202) 463-8700

MARCOS A. RAMIREZ IRIZARRY
DENNIS A. SIMONPIETRI MONEFELDT
RAMIREZ & RAMIREZ
117 Eleanor Roosevelt Avenue
Hato Rey, Puerto Rico 00918
(809) 758-5660

HECTOR RIVERA CRUZ
Secretary of Justice
Commonwealth of Puerto Rico

RAFAEL ORTIZ CARRION
Solicitor General
Commonwealth of Puerto Rico

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

95pp

[640 F. Supp. 474] *

UNITED STATES DISTRICT COURT
D. PUERTO RICO

Civ. Nos. 86-0730 (Jaf), 86-0721 (Jaf), 86-0720 (Jaf), 86-0714 (Jaf), 86-0719 (Jaf), 86-0718 (Jaf), 86-0717 (Jaf) and 86-0681 (Jaf)

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ISLA PETROLEUM CORPORATION and
GASOLINAS DE PUERTO RICO CORPORATION,
Plaintiffs,

v.

DEPARTMENT OF CONSUMER AFFAIRS and
PEDRO ORTIZ ALVAREZ, Secretary of the
Department of Consumer Affairs,
Defendants.

PHILLIPS PUERTO RICO CORE, INC.,
Plaintiff,

v.

PEDRO ORTIZ ALVAREZ, Secretary of the
Department of Consumer Affairs,
Defendant.

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* The numbers in brackets herein refer to the page numbers as they appear in the Federal Supplement.

SA-2

TEXACO PUERTO RICO, INC.,
Plaintiff,

v.

PEDRO ORTIZ ALVAREZ, in his official capacity as Secretary of the Department of Consumer Affairs and/or the Department of Consumer Affairs and/or the Commonwealth of Puerto Rico, through HECTOR RIVERA CRUZ, Secretary of Justice, in representation of Mr. Pedro Ortiz and the Department of Consumer Affairs,
Defendants.

CIA. PETROLERA CARIBE, INC.,
Plaintiff,

v.

PEDRO ORTIZ ALVAREZ, in his official capacity as Secretary, Department of Consumer Affairs and/or Department of Consumer Affairs,
Defendants.

THE SHELL COMPANY (PUERTO RICO) LIMITED and MOBIL OIL CARIBE, INC.,
Plaintiffs,

v.

PEDRO ORTIZ ALVAREZ, in his official capacity as Secretary, Department of Consumer Affairs and/or Department of Consumer Affairs,
Defendants.

SA-3

ESSO STANDARD OIL CO. (P.R.),
Plaintiff,

v.

PEDRO ORTIZ ALVAREZ, in his official capacity as Secretary, Department of

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Consumer Affairs, and/or Department of Consumer Affairs,
Defendants.

CARIBBEAN GULF REFINING CORPORATION,
Plaintiff,

v.

PEDRO ORTIZ ALVAREZ, as Secretary of the Department of Consumer Affairs of the Commonwealth of Puerto Rico,
Defendant.

TENOCO OIL CO., INC. and DISTRIBUIDORA DE GASOLINA EL COQUI, INC.,
Plaintiffs,

v.

DEPARTMENT OF CONSUMER AFFAIRS and PEDRO ORTIZ ALVAREZ, Secretary of the Department of Consumer Affairs,
Defendants.

June 4, 1986

On Motion for Stay Pending Appeal
June 10, 1986

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Alvaro R. Calderón, Hato Rey, P.R., Maggie Correa-Avilés, Arturo J. García Solá, McConnell Valdes Kelley Sifre Griggs & Ruiz-Suria, William Estrella, Rodriguez, Lebron & Estrella, San Juan, P.R., Celso E. López, Carlos F. López, Santurce, P.R., José R. González Irizarry, Ana Matilde Nin, McConnell Valdes Kelley Sifre Griggs & Ruiz-Suria, San Juan, P.R., Jaime Sifre Rodríguez, Luis Sánchez-Betances, Cepeda, Sanchez-Betances & Sifre, Hato Rey, P.R., Emilio Pena Fonseca, Noel S. González, Sweeting, Gonzalez & Cestero, San Juan, P.R., Dominguez & Totti, Carlos Romero Barceló, Hato Rey, P.R., Lopez Lay & Vizcarra, Santurce, P.R., for plaintiffs.

Dennis Simonpietri, Marcos Ramírez Lavandero, Ramirez & Ramirez, Hato Rey, P.R., for defendants.

MEMORANDUM OPINION AND ORDER

FUSTE, District Judge.

These are eight consolidated cases filed by gasoline refineries and wholesalers against the Secretary of the Puerto Rico Department of Consumer Affairs, hereinafter referred to as the Secretary and DACO, respectively. The various cases request declaratory judgment pursuant to Fed.R.Civ.P. 57 and 28 U.S.C. Sec. 2201, and injunctive relief pursuant to Fed.R.Civ.P. 65. Some plaintiffs claim violations

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to 42 U.S.C. Sec. 1983 [1] and relief is requested accord-

[1] Mindful of *Abadia v. Izquierdo Mora*, 792 F.2d 1187 (1st Cir. 1986), we need additional time to evaluate the evidence received on the issue of 42 U.S.C. Sec. 1983 liability. The trial of this cause was held with the understanding that no evidence of damages for a 1983 action would be presented. In that sense, the Court bifurcated the issue of liability, which we intend to decide as soon as possible.

ingly. It is claimed that certain orders fixing gross margins of profit and establishing a tax antipass-through provision at a given level of the industry, entered by the defendant Secretary of DACO after March 18, 1986 are tantamount to a deprivation under color of state law of plaintiffs' civil and constitutional rights secured by the fifth and/or the fourteenth amendments, United States Constitution. It is further claimed that the orders under attack are unconstitutional acts of deprivation of property without due process of law and, thus, are confiscatory in character. The margin-fixing/regulatory orders relate to the sale of gasoline at the wholesale level.[2] The challenged state action coincides in time with the enactment of Law No. 5, of March 18, 1986, 13 L.P.R.A. Sec. 4030C, which law imposed an additional excise tax on the importation of crude oil on a per-Barrel basis. The excise tax, variable in amount depending on the price of crude oil, is a legitimate exercise of Puerto Rico's fiscal autonomy. Law of Federal Relations art. 3 (1917), 1 L.P.R.A. Sec. 3. The excise tax is not under attack; however, the same has been ordered to be absorbed by those plaintiffs which are gasoline wholesalers.[3] One of the margin-fixing/regulatory orders, the first of two

[2] There are three levels of gasoline production and distribution in Puerto Rico, to wit: (1) refinery level; (2) wholesale level; and (3) retail sales level.

[3] The old, previous excise tax amounted to some 16 cents per gallon of gasoline. 13 L.P.R.A. Secs. 4010(b) and 4030. The new tax, as of May 1986, added an additional 14.29 cents per gallon, for a total tax of 30.29 cents per gallon of gasoline. The 16 cents are passed as cost to the consumer. As will be seen, the 14.29-cent tax is subject to DACO's antipass-through provision as per regulatory order of April 23, 1986.

orders issued on April 23, 1986, contains an antipass-through provision whereby the excise tax is to be charged against the allegedly exorbitant income of the gasoline wholesalers. The antipass-through provision assumes that the ultimate price paid by consumers at the gasoline pumps shall not be increased by reason of the excise tax.

Plaintiffs claim that the mentioned price control order containing the antipass-through provision, and two additional orders of April 23 and May 20, 1986, are invalid for the reasons already mentioned. These two orders determine gross margins of profit at 8.6 cents per gallon for wholesalers and 17.7 cents per gallon for retailers. Specifically, the May 20 order fixes margins of 8.6 cents and 3.6 cents per gallon for wholesalers, depending on whether they are "big" companies or "small" companies, as defined in the order under Class 1 and Class 2. In addition, it is claimed that the field of gasoline price regulation is preempted by federal policy, embodied in existing federal law, of an unregulated market. The plaintiffs reinstate their arguments of taking of property without due process of law through confiscatory orders, deprivation of equal protection rights, nullity of the regulations for failure to accomplish a legitimate statutory purpose and for vagueness. The substantive due process violations as alleged are compounded by claims of procedural due process violations that, seen in the context of the regulatory scheme, equate to substantive due process violations. It is alleged that the orders are null and void for the Secretary of DACO's failure to comply, for their issuance, with statutory requirements, nullity of the orders because of their retroactive character, arbitrariness, and capriciousness of the Secretary's actions, and gross constitutional deprivations under color of state law impermissible under the constitutional system of government.[4]

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[4] The sequence of orders for purposes of reader's guidance is as follows:

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Jurisdiction has been pleaded under 28 U.S.C. Secs. 1331 and 1343. We find that the pleadings in the consolidated cases raise substantial federal question under the Constitution and laws of the United States and, therefore, jurisdiction is present.

The Puerto Rico Manufacturers' Association (PRMA), a prominent, non-partisan entity in this jurisdiction, has been allowed to appear as *amicus curiae*. PRMA's position is against the regulatory scheme. Preemption is alleged to be present.

The court declined to permit a limited number of consumers to file their permissive intervention under Fed.R. Civ.P. 24(b). Said consumers appealed our refusal to allow them to intervene. Appellate emergency relief was denied by the United States Court of Appeals for the First Circuit on May 21, 1986, Misc. No. 86-8022.

Based on our analysis of the testimony and evidence received at trial, we hereby ENTER our Findings of Fact as required by Fed.R.Civ.P. 52. We note for the record that a large portion of the documentary evidence was received in Spanish. We dispensed of the strict application of the local rule regarding translation of documents in order to expedite and have the matter heard and resolved.

FINDINGS OF FACT

The Parties

The gasoline business in Puerto Rico is best defined as a three-level business composed of the refineries, the wholesalers, and the retailers. There are two refineries

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(a) Regulation No. 45, of August 29, 1975;
(b) Regulation No. 45, Amendment 1, of July 23, 1976;
(c) Order of March 26, 1986;
(d) Two orders of April 23, 1986;
(e) Order of May 20, 1986.

in Puerto Rico at the present time, one operated by Phillips Puerto Rico Core, Inc. (PHILLIPS), and the other operated by Caribbean Gulf Refining Corporation (CARECO). PHILLIPS only refines gasoline so as to make it available to the next level of distribution, the wholesaler. CARECO operates as a refinery and as a wholesaler of gasoline.[5] Plaintiffs are properly identified as follows:

(a) Isla Petroleum Corporation (ISLA) and Gasoline de Puerto Rico Corporation (GASOLINAS) are corporations organized and existing under and by virtue of the laws of the Commonwealth of Puerto Rico. They operate in the Puerto Rico market since 1981. ISLA is engaged in the business of wholesale distribution of gasoline to its dealers throughout Puerto Rico. GASOLINAS is engaged in the business of retail sales and wholesale distribution of gasoline throughout Puerto Rico through its stations and dealers.

(b) Phillips Puerto Rico Core, Inc. (PHILLIPS) is a corporation duly organized and existing and authorized to do business in the Commonwealth of Puerto Rico, which operates a petrochemical plant in Guayama, Puerto Rico, where it uses naphtha, a petroleum derivative, as a raw material to produce various petrochemicals. Gasoline is indirectly generated during PHILLIPS' petrochemical manufacturing process, and PHILLIPS sells the gasoline in Puerto Rico to wholesalers which, in turn, distribute it to the retailers.

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[5] PHILLIPS sells its gasoline to plaintiffs TENOCO COQUI, and CARIBE. It also supplies ESSO with gasoline under an exchange agreement. ESSO, in turn, delivers gasoline to PHILLIPS in Texas. PHILLIPS also supplies gasoline to CARECO and vice versa. In turn, CARECO supplies 80% of the referred gasoline needed by its marketing division for use by GULF/CHEVRON. The other 20% used by CARECO is supplied by PHILLIPS. CARECO also supplies TEXACO, SHELL/MOBIL, and CARIBE.

(c) Texaco Puerto Rico, Inc. (TEXACO) is a corporation organized and existing under and by virtue of the laws of one of the States of the Union and/or the Commonwealth of Puerto Rico. Said corporation is a gasoline wholesaler which, in turn, supplies its network of retailers who operate gasoline service stations.

(d) Cia. Petrolera Caribe, Inc. (CARIBE) is a corporation organized and exist-

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ing under and by virtue of the laws of the Commonwealth of Puerto Rico since 1976. CARIBE is involved in the wholesale of gasoline to its network of retailers who operate gasoline service stations in Puerto Rico.

(e) The Shell Company (Puerto Rico) Ltd. (SHELL) is a corporation organized under the laws of England. The same is authorized to do business in Puerto Rico. Mobil Oil Caribe, Inc. (MOBIL) is a company organized under the laws of the Republic of Panama. The same is duly authorized to do business in Puerto Rico. SHELL and MOBIL are separate and independent legal entities, managed by their respective officers. SHELL, through a Servicing Agreement entered into with MOBIL, manages and services MOBIL's business in Puerto Rico. Both entities act as wholesalers of gasoline. SHELL at times imports gasoline. The product is sold to the SHELL/MOBIL network of retailers that operate SHELL/MOBIL service stations in this jurisdiction.

(f) Esso Standard Oil Co. (P.R.) (ESSO) is a corporation duly organized and existing under the laws of the Commonwealth of Puerto Rico. ESSO is involved in the wholesale of gasoline to its network of retailers who operate service stations in Puerto Rico.

(g) Caribbean Gulf Refining Corporation (CARECO) is a corporation organized under the laws of the State of Delaware, duly authorized to do business in the Commonwealth of Puerto Rico. CARECO is primarily engaged in the refining of crude oil and the production and sale of refined petroleum products, including gasoline. CARECO's refining division sells the gasoline to various wholesalers, such as SHELL, MOBIL, CARIBE, and TEXACO. CARECO's marketing division, as wholesaler, sells gasoline and other petroleum products directly to over 270 independent dealers or retailers operating gasoline stations in Puerto Rico under the registered trademarks of "GULF" and "CHEVRON". Both CARECO and PHILLIPS have gasoline exchange agreements in full force and effect.

(h) Tenoco Oil Company, Inc. (TENOCO) and Distribuidora de Gasolina El Coquí, Inc. (COQUI) are the most-recently organized wholesalers of gasoline in the Puerto Rico market. TENOCO is a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Puerto Rico since 1982. It purchases gasoline from PHILLIPS and sells the same to retailers who operate independent service stations in Puerto Rico. TENOCO also sells wholesale to jobbers in the market. COQUI is a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Puerto Rico since 1982. COQUI's business is similar to that of TENOCO.

The incumbent of the Department of Consumer Affairs of the Commonwealth of Puerto Rico is Pedro Ortiz-Alvarez. Mr. Ortiz-Alvarez became Secretary of the Department on March 26, 1986. His predecessor, Carlos J. López-Feliciano, was Secretary of DACO commencing in January 1985. He was appointed Superintendent of Police and left DACO on March 3, 1986. The Depart-

ment's Organic Act is contained in 3 L.P.R.A. Secs. 341-341v (1973). The gasoline market, as it relates to DACO, is further regulated by more recent legislation containing specific legislative intent on the subject of gasoline. *See* 23 L.P.R.A. Secs. 1131-1135 (1978). The Secretary is being sued in his official and personal capacity as per specific allegations in the various complaints and/or amended complaints on file.

Existence of Gross Margin Standards Under Federal Regulations

Prior to January 20, 1981, each plaintiff, except TENOCO and COQUI, which came into being after said date, were subject to the federal petroleum pricing and allocation regulations under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. Sec. 751 et seq. (EPAA). Under regulations promulgated under the EPAA, the United States Department of Energy set maxi-

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mum gross margins of profit of 8.6 cents per gallon and 17.7 cents per gallon for wholesalers and retailers, respectively. The federal regulation labeled the wholesalers as resellers under the federal regulatory scheme. 10 C.F.R. Sec. 212.93 (1980). Those regulations provided guidance regarding the methods by which acquisition costs and gross profit margins were to be calculated. 10 C.F.R. Sec. 212.92. In the case of wholesalers, the federal regulations explicitly stated that the reseller (wholesaler) could not charge a price in a sale for any type or grade of gasoline which exceeded the most recent acquisition cost, plus 8.6 cents per gallon, *plus tax cost* attributable to the sales of that type or grade of gasoline. Beginning June 15, 1980, the Department of Energy was to adjust semiannually the fixed cent-per-gallon amount to reflect the gross national product deflator factor. Tax cost was defined *to include* the cost of federal, local, and *state*

excise, sales, and other attributable taxes related to the gasoline sales and computed on a per-gallon basis. The factor of cost *was not* to include federal, state, and local income, property or franchise taxes. Acquisition cost for resellers (wholesalers) was the cost of product in inventory computed pursuant to the seller's historical accounting practices on a per-gallon basis, including transportation cost of bringing the product to inventory. 10 C.F.R. Sec. 212.92(b) (1980). By virtue of presidential executive order, President Reagan lifted federal price controls on crude oil and refined petroleum products effective January 28, 1981. Exec. Order No. 12287, 46 Fed. Reg. 9,909 (1981).

Before federal deregulation became effective, and specifically on August 29, 1975, DACO promulgated Regulation No. 45, which intended to implement certain authority of the Secretary of DACO under 23 L.P.R.A. Sec. 734 and DACO's enabling act, 3 L.P.R.A. Sec. 341e, to regulate the prices of gasoline, kerosene, and diesel fuel. The regulation classifies the products as of "prime necessity". Obviously, at that time DACO lacked authority to control the prices of petroleum and petroleum-derived products, inasmuch as the EPAA had preempted the field. 15 U.S.C. Sec. 751. Puerto Rico was treated as a state under said federal law. 15 U.S.C. Sec. 752(7). Price Regulation No. 45 was amended on July 23, 1976 by its Amendment No. 1 to reflect and accept the preempted status of the industry. Amendment No. 1 provided that the authority there contained would not become effective until the lifting of federal price controls and allocation controls. Thereafter, Regulation No. 45, Amendment No. 1, was the document to which the local industry and DACO referred to in the field of local gasoline regulation. (See footnote 4 to this Order). By its express terms, the regulation became effective upon the lifting of federal price controls on January 28, 1981. Our examination of Regulation No. 45 and its Amendment No. 1, seen in light of the evidence received at trial,

shows that the same does not contain a specific price/margin-of-profit regulation. The regulation does not set specific margins of profit. In this sense, articles 2, 3, and 4 of the regulation are most important. They show that after January 28, 1981, DACO understood it *could* regulate prices as per articles 2, 3, and 4, to wit:

> Article 2—Purposes
>
> This regulation controls the prices and maximum margins of profit in the sale of gasoline, kerosene, and diesel fuel at all levels of distribution, including refineries, by establishing the mechanism by means of which the Secretary will set and revise said prices. In addition, the prior regulation related to this matter is repealed.
>
> Article 3—Declaration of Sale Prices:
>
> Once the federal price controls over products regulated herein cease, and while the Secretary has not set the maximum prices of the product in question, no person can increase the sale price of the product unless he informs the Secretary in writing of the proposed change with at least 15 days' prior notice to the date the change comes into force.
>
> Article 4—Price Orders:
>
> [482]
>
> On his own initiative or at the request of an interested party, the Secretary can issue orders fixing prices and maximum margins of benefit in the sale of the regulated products at any distribution level in accordance with the following criteria:
>
> • • • • •
>
> (h) gross reasonable benefit to the wholesaler and the dealer
>
> (1) reasonable margin for operational costs;
>
> (2) reasonable net benefit margin;

(3) turnover of the product;

(4) adjustment to the gross benefit margin considering the turnover of the product.

(translation ours).

As it can be plainly seen from Regulation No. 45, as amended, the Secretary understood that he had the power to issue price/regulatory orders. Regulation No. 45 *per se* was not a price order or price regulation.

DACO's policy regarding the implementation of Regulation No. 45, as amended, accrued and commenced to be expressed after January 28, 1981, when federal controls under the EPAA ceased to exist. The credible evidence is to the effect that former Secretary Héctor Ricardo Ramos-Díaz informed the public of the existence of Regulation No. 45, as amended, as a result of the expiration of federal controls. However, our careful examination of defendants' exhibits 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18, does not support the conclusion that a formal order was ever entered by DACO adopting the 8.6 and 17.7-cent margins last enforced by federal regulation. The testimony received by the Court from former Secretary Carlos J. López-Feliciano and from the vast majority of the witnesses so confirms. However, there is evidence that DACO and the wholesalers/retailers adopted informally *as a reference point for future regulation* the federal margins as they existed on January 28, 1981. As a matter of fact, the press release of former Secretary Ramos-Díaz, dated February 23, 1983, defendants' Exhibit 14, at page 10, leaves no room to doubt that as of that date DACO had only made use of Article 3 of Regulation No. 45, as amended, seen in light of the guidelines existing at the time of federal deregulation. The press release states in its page 10, first and second paragraphs:

> The price system that we have imposed can be summarized in the two basic mechanisms that Regulation 45 (amendment 1) provides to wit: (1) that

> no person can raise the prices at which he sells the products mentioned without notifying the Secretary of the proposed increase with 15 days' prior notice (Reg. 45, amend. 1, art. 3), and (2) that on its own initiative or at the request of an interested party, the Secretary can issue orders fixing and revising the prices and margins of maximum benefit of the regulated products at any or all the levels of distribution following a series of guidelines (Reg. 45, amend. 1, art. 4).
>
> Up to the present, this Agency has only made use of the first of these—that established in article 3 of the Regulation—adhering to the same the margins of benefit that were enforced at the time the federal controls ceased. In this way we supervise that the prices of sale of gasoline be maintained within the established margins and that any increase be notified accordingly. (Translation ours).

The truth of the matter is that DACO never approved a price order in accordance with the procedural requirements of Commonwealth law to implement and enforce the federally-established 8.6 and 17.7 cent-per-gallon gross margins of profit for wholesalers and retailers as a standard in reviewing wholesale or retail prices. Our notes of the testimony of former Secretary Carlos J. López-Feliciano so confirm unequivocally. The actual Secretary and defendant had to admit, when put in a nonelusive position, that this was the case. However, there is no doubt in our mind that the 8.6 and 17.7 cent-per-gallon margins were used to overlook the industry as if their presence in the historic legal con-

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text could result in actual price regulation under Regulation No. 45, as amended.[6]

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[6] Obviously, if anyone claims that the federal margins became effective in Puerto Rico as law by regulation, then, of course, all

Subsequent to the lifting of federal petroleum pricing regulations, the petroleum industry in Puerto Rico did not comply with Regulation No. 45, Article 3, by submitting proposed price increases to DACO fifteen days prior to the requested effective date of such increases. There are, however, a few instances where DACO flexed muscle against the industry on the basis of Article 3 and some cases where the industry came to DACO to confess having gone beyond the former guidelines. To that effect, we received in evidence defendants' Exhibits 10, 11, 12, 13, 19, 20, 34, 35, and 36, where, on a very limited number of occasions, DACO exchanged correspondence with the companies on the subject. On two occasions, in 1982 and 1983, SHELL pleaded *mea culpa* and voluntarily adjusted its prices. Defendants' Exhibits 19, 20. On one occasion, ESSO threatened a retailer with contract cancellation for charging high prices for gasoline. Defendants' Exhibit 33. In summary, only Article 3 of Regulation No. 45 was in force. No price/margin-fixing orders as per Article 4 of Regulation No. 45 were ever approved. The industry played the game with DACO by not going overboard on price setting, bearing in mind the historical federal margins and DACO's announced power to regulate. For the period 1981 to 1986, the industry in this sense was a free-competing market subject to the caveats mentioned herein.

During the period of 1983-1984, there was by no means a vigorous enforcement of Regulation No. 45. Enforcement became more of a monitoring effort on the part of DACO. Prices remained relatively stable. The personnel to gather data, conduct economical studies, regulate, and monitor simply was not available. DACO never withdrew Regulation No. 45, as amended. DACO never formally implemented enforcement procedures to penalize

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the parameters, definitions, cost, and expense data related thereto also was in effect. This, of course, is not the case that was presented to the Court.

offenders. There is evidence that no offenders were charged or fines imposed or paid. There is evidence that DACO conducted no study directed to implement Article 4 of Regulation No. 45, as amended, during the years 1981 to 1984. The industry relied on the fact that they had at least a *de facto*-protected margin of profit of at least 8.6 and 17.7 cents at the wholesale and retail levels, presumably as these margins were defined in the federal regulations that ceased to exist in January 1981. Be it remembered that the federal margins allowed for the given margins to be gained on the basis of the most recent acquisition costs plus the taxes attributable to the transaction, including the cost of federal, local, and state excise and sale taxes and other attributable taxes related to the gasoline sales, but not including federal, state or local income, property or franchise tax. There is evidence that DACO up to the end of year 1984 was not in a position to enter a price/margin-fixing order related to margins of profit. The court was not presented with such an order or with studies that would enable DACO as of 1984 to enter said orders taking into consideration gross reasonable benefit to the wholesaler or dealer, reasonable margin for operating costs, reasonable net benefit margins, turnover of the product or adjustment as a result thereof. No evidence of an adjustment based on the GNP deflator factor was presented in evidence.

With this background in mind, we now look at the historic legal events of 1985-1986 which bring about this litigation. In January 1985, Carlos J. López-Feliciano became the Secretary of DACO. By mid-July 1985, Mr. López-Feliciano determined that DACO should resume active enforcement of the policy of the previous administration regarding the fifteen-day notice requirement of change in prices as per Regulation No. 45, Article 3. To that effect, Secretary López-Feliciano sent a July 1985 report to the interagency committee created to study the gasoline industry as per 23 L.P.R.A.

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Sec. 1131. We carefully examined the report, defendants' Exhibit 31, in light of the September 1985 communication to wholesalers, excepting TENOCO and COQUI, Exhibits 22-32. There, we find a restatement of the historical deregulation described in these findings. At page 5 of the report, Exhibit 31, we find a restatement that only Article 3 of Regulation No. 45, as amended, was in full force and effect and that DACO kept its vigilance and/or watchfulness of the wholesalers and retailers so as to avoid them from exceeding the historic federal margins of 8.6 and 17.7 cents per gallon. There, at pages 6 to 9, inclusive, Secretary López-Feliciano renders to the interagency committee an update on the status of the industry as of July 1985. The status of the pricing situation of gasoline was not to be blamed on the wholesalers or on any wrongdoing on their part. It was stated that prices for the period 1982 to March 1985 declined to then increase slightly due to causes mainly attributable to world market conditions. He further expressed his concern that due to world market conditions and low inventory of gasoline kept by stateside refineries, the prices were not coming down as expected. He further suggested that mechanisms be studied to allow the consumer to participate in the savings represented by lower crude costs. *Most important, it was stated that the Puerto Rico retailers were not pleased with the fact that some retailers were selling their gasoline at retail costs lower than 17.7 cents*, that the retailers' margin of profits was ranging from 3.12 cents per gallon to 12.4 cents per gallon, and that this sector of the industry was depending on competitive pricing. As a result thereof, *the retailers wanted an order to fix minimum prices for the sale of gasoline* and that the incentive programs by wholesalers to retailers on the sale be evaluated.[7] The memorandum

[7] The Court has examined the public record of hearings held by DACO at the request of the Retailers' Association on January 30,

rested by stating that the interagency committee was to establish public policy to follow in the future to guide the industry accordingly.

Although we do not have the benefit of the resulting interagency committee recommendations on future policy, it is a known fact that in the latter part of 1985, DACO commenced to look into the profit margins that were being realized by wholesalers. Information requests were sent to all companies at the wholesale level. Information was gathered and, *even though at the beginning of 1986 the study was not complete*, DACO concluded that the margins of profit of wholesalers ranged from a low figure of 6.90 cents per gallon to a high of 16.76 cents per gallon. As stated before, in response to a request by the Retail Gasoline Dealers' Association, hearings were convened on January 30, 1986, to obtain information from the companies as to the level of their margins and the reasons therefor. While the Retail Gasoline Dealers' Association withdrew its request, DACO held the hearings and continued to examine the margins of profit of wholesalers. DACO concluded and so informed the Legislature of Puerto Rico, that while the price of a representative grade of crude oil had declined between November 1985 and February 1986 and the average refiner price had also declined, the average price of Puerto Rico's wholesalers had not declined as expected. It was concluded that the wholesalers' margins of profit were excessive.[8] To that effect defendants presented

1986. The transcript was part of one of defendants' exhibits, but remains unnumbered. There, the retailers complain of wholesalers as enemies of consumers, having by no means the characteristics of "sisters of charity." Transcript at 41. It is obvious that the retailers who wanted an order fixing minimum prices are no sisters of charity either.

[8] The Court received the testimony of Secretary of Treasury Juan Agosto-Alicea. His testimony was characterized by his good

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in evidence a series of exhibits as summaries under Fed. R.Evid. 1006, only admitted by the Court for limited purposes under Fed.R.Evid. 105. The summaries were offered without laying the proper foundation and without making the supporting documents available for inspection. In any event, the Court admitted the summaries for the limited purpose of proving that the Secretary considered the summaries in the rulemaking process. These are defendants' Exhibits 1, 2, 3, and 6. These exhibits were prepared by an employee of DACO, Carlos Lasanta. Mr. Lasanta holds a Bachelor's Degree in Business Administration from the Interamerican University. He directs the Division of Economic Studies of DACO. During the tenure of Carlos J. López-Feliciano as Secretary of DACO and *after* January 1985, he became involved in the gasoline regulation. His testimony shows that the witness is a well-intended person, but not a person qualified to conduct studies on the economics of the petroleum industry for regulatory purposes. We find that Mr. Lasanta's testimony was of little assistance to the Court. He gave no solid ground upon which we could find that DACO had studies of value to rely upon. This particular situation motivated our ruling not to depart from the strict compliance with Fed.R.Evid. 1006. If the nonavailable supporting data to the summaries was primarily Mr. Lasanta's work, the reliability of that evidence was to be put in question.

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professional standing in the community. He admitted without hesitation that DACO's information was relied upon by Treasury. It was "overall" information. No breakdown by companies was given. Of course, Treasury assumed that DACO had done its job. Those called upon to review this Order are directed to defendants' Exhibits 1, 2, 3, and 6 (irrespective of the fact that they were admitted for limited purposes), and Exhibits 27, 28, and 37. They constitute DACO's financial data. The constitutional rights of parties cannot be curtailed on the basis of such data.

Relying on the information supplied by DACO and considering rapidly-declining crude oil prices and the alleged failure of cost reductions to be passed through fully to Puerto Rico's consumers, the Puerto Rico Legislature enacted Law No. 5, of March 18, 1986, 13 L.P.R.A. Sec. 3040C, to impose an additional excise tax to the existing 16-cent excise per gallon of gasoline. 13 L.P.R.A. Secs. 4010(b) and 4030. The new excise tax is imposed on crude oil and refined petroleum products. The amount of the tax was designed to vary, depending on world prices of crude oil, as determined by certain specified indices, in the second month prior to the month in which the tax is imposed. For the month of April 1986, the tax was set at $5.00 per barrel or $0.119 cents per gallon of gasoline. In May 1986, the tax was set at $6.00 per barrel or $0.1429 cents per gallon of gasoline. For the wholesalers who purchase gasoline from PHILLIPS and CARECO as refineries, the tax is included in the price of the gasoline purchased. Those wholesalers who import gasoline into Puerto Rico, such as SHELL, are required to pay the tax on such imports directly. The level of the tax in future months is at present unknown, inasmuch as it varies inversely with world crude prices. The record indicates that world oil prices have increased in the past two months.

The legislative intent behind Law No. 5 provides, in its pertinent part, as follows:

> [S]ince the descent in the world price of crude oil began, and today it is below $13.00 per barrel, no pattern whatsoever has been observed that indicates that the reduction has also been favorable to the Puerto Rican consumer. On the contrary, in Puerto Rico the price of gasoline, among other consumer goods, has remained stable. This means that petroleum importers or distributors have increased their profits without a sufficient part of that price savings having been transferred to the consumer.

Faced with this reality, the State has the obligation of adopting measures for guaranteeing that the benefit obtained from the drastic drops in world petroleum prices is also transferred to the entire Puerto Rican public. *This will be achieved in part through the imposition of the excise provided in this law,* whose purpose is to channel resources for social welfare works and services, *and on the other hand, using governmental mechanisms for price control, if the businesses do not channel them on their own initiative.*

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Therefore, the purpose of this law is to transfer a portion of the benefits represented by the drop in crude oil prices to all consumers, through public works and services. At the same time, without affecting today's prices in the marketplace, nor the fair, reasonable profit margin of the petroleum producing and distributing companies, each Puerto Rican consumer will receive, in an adequate fashion, the benefit of a substantial drop in the price of gasoline and other derivative products.

Law No. 5 at 1 (emphasis added).

Faced with the legislative intent, whereby an excise tax was being imposed and, on the other hand, governmental mechanisms for price control were to be exercised to prevent the consumer from having to pay for the tax, DACO and the Department of Treasury implemented a plan to accomplish such legislative intent. Be it remembered that up to this time, Regulation No. 45, Article 3, was in effect *only requiring* a fifteen-day notice on price increases. No price fixing order *per se* existed as of the date the law came into effect on March 18, 1986.

The evidence shows that the general public was fearful of the tax and its consequences. There had been public debate on whether the legitimate exercise of the power of fiscal autonomy would eventually freeze or reduce

gasoline cost to consumers. The evidence shows that faced with strong public concern, the Department of Treasury published the following advisory in the local newspapers:

March 17, 1986.

IMPORTANT FACTS REGARDING THE REDUCING EXCISE TAX FOR PETROLEUM

Background

Between November, 1985 and February of this year, the price of petroleum went down on a worldwide level from $30 to $14 per barrel.

This has caused a dramatic reduction in the price of gasoline worldwide. Notwithstanding, until recently Puerto Rico had not noticed a proportional reduction in the price of gasoline.

By means of new legislation, an excise tax has been enacted to reduce the excessive profits of the dealers in oil ("petroleras") and wholesaling companies which are being derived as a result of the reduction in the cost of petroleum.

What is the purpose of the reducing excise tax?

That the people of Puerto Rico share in the benefits of the decrease in the price of petroleum.

Who is going to pay this reducing excise tax?

The dealers in oil ("compañías petroleras") will pay the Government of Puerto Rico part of their excessive earnings due to the reduction in the price of petroleum.

What use will be given to the funds collected through the reducing excise tax?

The collected funds shall be for the benefit of citizens through public works and government services.

How are the electricity rates to be affected?

With the decrease in the price of petroleum, the consumer is already receiving the benefit. The tariffs have decreased in 15% and it is expected that they will go down 40%.

Will the price of gasoline increase as a result of this reducing excise tax?

No, DACO will make sure that the price of gasoline is not raised.

What is the position of the Gasoline Retailers' Association?

"Contrary to the position taken in these public hearings by the petrochemical companies in opposing this bill, we, in just recognition of the need of resources by the Government of Puerto Rico, and recognizing that it is a better alternative that the money earned in excess by the petrochemical companies, the moneys earned and those to be earned if the Government does not stop them, be used for the benefit of our Government to

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realize those public works beneficial to the people of Puerto Rico.

This measure, coupled with adequate supervision *over the abusive earnings* of the petrochemical companies, taking as an example the present situation whereby they are earning more than 20 cents in excess per gallon, allows the Government to obtain the 9.5 cents of the excise tax and more so, the gasoline should decrease more than 10 additional cents per gallon at this moment."

Statement Gasoline Retailers' Association of Puerto Rico before the House Committee on Finance, Commerce, and Industry.

The citizen will not pay more for gasoline; and the funds collected by means of this reducing excise tax will be for the benefit of the people of Puerto Rico.

Orientation Message

Commonwealth of Puerto Rico

DEPARTMENT OF TREASURY

(Translation ours; emphasis added).

Thereafter, on March 26, 1986, DACO, through defendant Secretary Pedro Ortiz-Alvarez, issued an order where it reasserted that pursuant to regulation No. 45, Article 3, no price increase could take effect unless it had been submitted to DACO for approval fifteen days prior to the effective date of the increase.

On April 23, 1986, DACO issued two orders.[9] The first order determined that the Law No. 5 new excise tax imposed on crude oil and derivatives like gasoline could be passed through by the refineries to the gasoline wholesalers. The gasoline wholesalers were forbidden, by virtue of the order, to treat as a tax cost chargeable to retailers, the import of the excise tax. The net result was a determination by DACO that the parties chosen to absorb the tax were the wholesalers with an antipass-

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[9] During the first trimester of 1986, and since the wholesalers were operating under a *de facto* deregulated free-competition market, as the price of gasoline went down, the competitive forces lagged and the downward tendency in prices did not reach the consumer as fast as DACO expected. In this sense, it can be said that the companies had profit. One could say simply profit or excessive profit, but the description is immaterial. There was no frame of reference for the "excessive" determination. "Excessive" is a relative term. The conditions as observed are typical of a free market—as prices go down at a higher level in the distribution of goods, competing interests watch each other until matters settle. The same occurs with price increases. Nothing extraordinary occurred during January-March 1986.

through provision operating against them. This order was, for all material purposes, a price-fixing/regulatory order. The second order of April 23, 1986 issued by DACO forbade wholesalers to sell at *any price* higher than the price they had charged on March 31, 1986, without the express approval of the Secretary. The April 23 orders, as well as the March 26 order, were issued without notice and hearing as required by 23 L.P.R.A. Sec. 341g(a), 3 L.P.R.A. Secs. 1041-1059, and/or 3 L.P.R.A. Sec. 341e, seen in light of Sec. 341g(a). A hearing was to be held *a posteriori* to allow wholesalers to present evidence and argument on, among other things, the course that future regulation on the subject was to take. The plaintiffs received the April 23 orders.

Although there is no evidence that at any time before the April 23, 1986 orders any wholesaler was forced to sell the gasoline under cost, there is overwhelming evidence on this record that the timing of the April 23 orders coincided with increased acquisition costs for all wholesalers and these increases in cost, coupled with the imposition of the tax at the wholesale level by DACO, and the freezing of prices as of March 31, 1986, as per the two orders of April 23, did cause plaintiffs to have to sell below their acquisition cost of gasoline on a current basis, beginning in late April and up and until the date of trial.

Plaintiffs TENOCO and COQUI sought administrative relief from the April 23 orders by petition dated April 28, 1986. The Secretary responded in an order issued directed to those two companies, dated April 29, 1986. There, the Secretary *admitted* publicly that these two companies did not

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increase their per-gallon gross margins during the first three months of 1986. The Secretary further noted that these two companies had added an important competitive element in the gasoline market.[10] Two orders, similar in text, were issued, one directed to TENOCO and the other to COQUI, both bearing the date April 29, 1986. The orders are most revealing and their identical text is transcribed herein:

RESOLUTION AND ORDER

The above captioned company is engaged in the distribution of gasoline in Puerto Rico. It has objected the application to it of the Order issued by the Department of Consumers Affairs to gasoline wholesalers, published on April 23, 1986.a

The situation set forth by this company deserves special attention. *It is a small company, economically weak,* that distributes a small portion of gasoline which is sold in Puerto Rico. During the past years it *has added an important competition element in the gasoline market and has, in effect, stimulated lower prices for the consumer.*

The gross margin of profits of this company has normally been under the 8.6¢ per gallon, and occasionally it has been substantially lower. The evidence gathered up to now does not allow to conclude that they withheld excessive earnings during the first three months of 1986 as a result of the reduction in the prices of crude oil. Their prices for March 31, 1986 were lower than those offered by the companies with higher volumes of sales.

In view of the foregoing, we hereby authorize the above-captioned company to establish their prices of sale to retailers at the same level in which the competitors sell leaded and unleaded gasoline. Their prices must not allow a margin or profit higher than 8.6¢ per gallon. *Experience shows us that this company makes a special effort to maintain its prices*

[10] This constitutes an admission that the market was fiercely competitive before the regulations at issue were enacted.

underneath those of its competitors. Nevertheless, for the purpose of verifying that it maintains that pricing policy, they are required to file at this office, on Wednesdays of every week, copies of the bills of five (5) sales carried out on Mondays and five (5) on Thursdays.

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Given in San Juan, Puerto Rico, on April 29, 1986.

Signed Pedro Ortiz Alvarez; Pedro Ortiz Alvarez, Secretary.

The orders, while recognizing the patent and obvious injustice caused as a result of the April 23 orders, did not provide satisfactory relief. This is so because TENOCO AND COQUI had been operating under Regulation No. 45, Amendment 1, under free market competition conditions. They had priced their products below the prices of the larger wholesalers in order to be competitive and the prices of these competitors were being held down by the application of the second April 23 order directly to them. In other words, the April 23 orders and the April 29 order imposed a hardship on TENOCO and COQUI directly, inasmuch as the absorption of the tax without "pass through" and the raise in costs, seen in light of the price freeze in a market that was *de facto* deregulated, forced them to sell under cost in order to compete with other companies and be able to supply their customers.

On May 12, 1986, DACO conducted *ex post facto* hearings to deal with the April 23, 1986 regulation. Plaintiffs TENOCO and COQUI participated in the hearings in a meaningful way. The other plaintiffs announced that they would not participate because they had filed their complaints in the instant proceeding.

On May 15, 1986, we entered an order in the consolidated proceedings, entitled "Minutes of Proceedings and Order", Docket

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Document No. 14. There, we denied the second request by TENOCO for a temporary restraining order. In so doing, we reaffirmed the earlier denial by Chief Judge Pérez-Giménez. We were of the view that the broad picture had to be presented to the court. We directed DACO to pass upon and decide on TENOCO's request for reconsideration of resolution and order subscribed by counsel on May 8, 1986. The Court expected DACO's prompt attention to the matter before the scheduled pretrial conference and hearing set for May 20-21, 1986. In the event that no action was taken by DACO as directed by us, we would understand that DACO had denied the requested relief.

The pretrial conference was held in open court as scheduled on May 20, at 4:30 P.M. Extensive argument was heard. All kinds of proposals to solve the dispute were considered. That same day, May 20, DACO issued an order which did not address the subject matter to which we had directed their attention. The order was a new order which set aside the second April 23, 1986 order fixing margins of profit and freezing prices at levels of March 31, 1986. The new order regulated anew the gasoline wholesale sector of the industry.[11] The May

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[11] At the pretrial hearing, counsel for the defendants argued that the challenged second April 23 order had been rescinded and that the litigation was moot. In turn, defendants elected to file a motion to dismiss, rather than a responsive pleading directed to meet the issues of the complaint. We decided to take plaintiffs' pleadings as amended to include the May 20, 1986 order and entered for defendants' benefit a general denial of plaintiffs' allegations. We preserved defendants' motion to dismiss and took all argument and allegations there raised as affirmative defenses. Fed.R.Civ.P. 8(f). We understood it to be our duty to beware of efforts to defeat injunctive relief by the issuance of a new order that clearly did not solve the dispute. The proposed reform did not demonstrate that there was reasonable expectation that the wrong would be discontinued. The record developed at the pretrial conference

20, 1986 order stated that all wholesalers whose average gross margins from the beginning of 1986 to the date of the order did not, in effect, exceed 8.6 cents per gallon, could continue to obtain up to an 8.6 cent gross margin. The companies identified as being in this Class 1 category were TENOCO, COQUI, and CARIBE. All wholesalers whose average gross margins from the beginning of 1986 to the date of the order did, in effect, exceed 8.6 cents per gallon, were permitted to obtain up to 3.6 cents gross margin until they could show the Secretary and defendant Ortiz-Alvarez that their average gross margin from the beginning of 1986 is lowered to 8.6 cents, at which time they would be permitted to obtain an 8.6-cent margin. The companies tentatively identified as being in this Class 2 category were TEXACO, SHELL/MOBIL, ESSO, and GULF/CHEVRON. GASOLINAS/ISLA was not included in the order, presumably by inadvertent error. At the time trial concluded, no additional order was made known to the court that would cure the exclusion.[12]

In order to "stabilize" for the consumer the price impact of the order and to maintain the historical (not

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convinced us that defendants' proffering of mootness did not suffice to make the case moot. Courts have power to grant injunctive relief even if one party claims discontinuance of the alleged illegal conduct. The purpose of an injunction is to prevent future violations. The record clearly demonstrated that the relief was needed. There existed cognizable danger of recurrent violations, more than mere possibilities. We so found at trial. *See United States v. W.T. Grant Co., et al.*, 345 U.S. 629, 633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). There was no clear proof of vindication of rights or abandonment of the questioned practices. *Cf. United States v. Oregon State Medical Soc.*, 343 U.S. 326, 333, 72 S.Ct. 690, 695, 96 L.Ed. 978 (1952).

[12] The 8.6 cent-per-gallon margin for highly-competitive wholesalers like CARIBE, TENOCO, COQUI, and even GASOLINAS/ISLA, was no solution to the problem. A $20 margin would not have helped. Their threshold margin was that of competition. For them to compete, they had to undersell others.

legal) price differential between the major companies and the small wholesalers, DACO activated a fund known as "Fund for Prime Need Articles", 23 L.P.R.A. Secs. 734, 745, from which the gasoline prices to Class 1 wholesalers would be subsidized in the amount of ten cents per gallon, and Class 2 wholesalers

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would be subsidized by five cents per gallon. Secretary Ortiz-Alvarez could not explain at trial how this emergency fund would operate; however, he offered an *impromptu* solution when he stated that one way of solving the problem would be that the payments on the subsidy would be given in the form of credits on the excise taxes owed by the refineries and importers of gasoline under Law No. 5, so that no company would be required to make an out-of-pocket payment in order to effectuate this program.[13] Companies could request special relief from the May 20, 1986 order and DACO would convene hearings within five days of any request. Furthermore, additional *ex post facto* hearings were set for June 2, 1986. On said occasion, DACO would receive comments from all interested persons on the appropriateness of the May 20, 1986 order.

Surprisingly, this third price-fixing order confirms that the two April 23 pricing orders, as well as the May 20 order itself, were based on anything but soft data. The order requested parties to come forward with the hard

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[13] We do not question taxing authority, but, as a matter of curiosity, we looked for the legality of the proposed offset. We find no authority in law for the DACO Secretary's proposed arrangement. We also looked at the emergency fund statute (Fund for Prime Need Articles), 23 L.P.R.A. Sec. 734. By no stretch of the imagination such fund could be legally used to subsidize gasoline wholesalers. However, this we only comment on. It is for DACO to explain to taxpayers the legality or morality of the use of such fund.

data that any rule-making body would consider *before* regulating, to wit:

(1) Detailed evidence of costs and operating costs;

(2) evidence to demonstrate the excess profits achieved during the first three months of 1986 and evidence of how said excess profits have been reduced during the second trimester of 1986;

(3) evidence of whether the operating costs of wholesalers have increased significantly since 1981 when federal controls ceased to exist and evidence of the reasons behind such increases;

(4) evidence of whether there exist significant differences between the costs of operation of wholesalers in Puerto Rico versus wholesalers in Continental United States, and evidence of the reasons behind such differences;

(5) evidence of why the margins of profit of wholesalers increased substantially during the first trimester of 1986 while its costs decreased, and what measures, if any, DACO should consider to avoid this from happening again;

(6) evidence of how changes are to be made to the order of May 20, in order to achieve the following purposes:

(a) force the wholesalers to return *unreasonable* profits obtained during the first trimester of 1986;

(b) stabilize the price for Puerto Rico consumers;

(c) attain vigorous competition, including the safeguarding and viability of the small wholesalers' survival in the market;

(d) achieve free competition as soon as possible.

We find as a matter of fact that in the circumstances *of this case* plaintiffs did not have sufficient opportunity to be heard. Advance notice and hearings of some significance were not provided. The March 26 order, seen in light of the two orders issued on April 23 and the May 20 order, dealt with matters of sufficient importance in the field of price and margins-of-profit regulation of the gasoline industry so as to require these hearings. The May 12, 1986 hearing announced in the second order of April 23, 1986 had no meaningful purpose. TENOCO and COQUI participated; DACO had the benefit of the allegations before this Court. The evidence received at trial convinces us that these hearings had no meaningful purpose of regulating gross profit margins in the wholesale/retail of gasoline. DACO and defendant Pedro Ortiz-Alvarez had their mind set on the remedies to be afforded. The orders had no legitimate regulatory purpose. They simply obeyed to DACO's public commitment

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of keeping the lid tight on the gasoline industry irrespective of consequences, so as to accomplish the publicly-made promise that DACO would not allow the prices of gasoline to go up. In so doing, DACO disregarded substantive due process considerations in that the confiscatory and illogical results of the mentioned orders were imposed irrespective of the economical consequences on plaintiffs as outlined herein. In so doing, DACO disregarded procedural due process, which, as a matter of fact, compounded the substantive due process violations in issuing price fixing/regulatory orders without regard to the logic or consequences of its actions.[14]

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[14] We do not decide this case based on procedural due process considerations. However, the truth of the matter is that, if we were to examine procedural considerations in light of the Admin-

The evidence indicates that defendant Secretary Pedro Ortiz-Alvarez relied principally on information and studies provided to him by Mr. Carlos Lasanta, whose qualifications we cannot responsibly accept. The evidence further confirms that even though defendant Pedro Ortiz-Alvarez claimed to have before him prior to entry of the April 23 orders defendants' Exhibits 1, 2, 3, and 6, his testimony was contradicted when Mr. Lasanta had to admit that Exhibits 3 and 6 were prepared after the April 23 regulation and after the April 29 resolution and order concerning TENOCO and COQUI.

The testimony of the defendant Pedro Ortiz-Alvarez and his immediate predecessor Carlos J. López-Feliciano merit a special finding. They were the two secretaries of DACO who intervened directly with the challenged regulation.

The testimony of the former Secretary López-Feliciano was straightforward testimony. The same was of assistance to the Court. His answers to the questions posed were responsive. There was an obvious cooperative attitude on his part to the judicial proceeding. López-Feliciano admitted that the policy of DACO at the time he became Secretary in January 1985, was one of non-intervention. DACO was like a watchdog overlooking the industry. There were no price-fixing or margin-of-profit orders in effect at the time he assumed the duties of the office. DACO had a monitoring and surveillance policy using as guidelines the 8.6 cent-per-gallon and 17.7 cent-per-gallon margins as last enforced in 1981 under

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istrative Procedure Act, 5 U.S.C. Sec. 500-576, or even under procedural local law, 3 L.P.R.A. Sec. 341g(a), 3 L.P.R.A. Secs. 1041-1059, and/or 3 L.P.R.A. Sec. 341e, seen in light of Sec. 341g(a), the procedures followed would leave an administrative-law expert breathless. If it had been only procedural due process violations, the whole matter could have been solved by curing the defects. This is, of course, not the case because of substantive due process and preemption considerations.

federal regulation. He followed the strategy of his predecessor, Secretary Héctor Ramos, using as a guideline Regulation No. 45, Amendment 1, of 1976.

Under his leadership, DACO first began to look into the profit margins in November/December 1985. The guidelines followed had no supporting studies. They were borrowed from federal regulation. Hearings were had in January 1986. At the time he left office to become Police Superintendent, that is, on March 3, 1986, there was no report on the subject discussed herein.

Contrary to the straightforward demeanor of former Secretary López-Feliciano, the testimony of the defendant Pedro Ortiz-Alvarez was defensive and biased to DACO's position. This defendant could not tackle specifics on the subject of the underlying studies and policy which motivated the first price-fixing orders in the industry since 1981, to wit: The April 23 order and the May 20, 1986 order. Ortiz-Alvarez had to admit that the May 20 order was prepared in contemplation of trial by retained trial counsel Messrs. Coleman and Robinson, and assistants Hearing Examiner Hjalmar Flax, Evelyn Otero, Carlos Lasanta, Assistant Secretary Matilde Acevedo, and himself. However, he tried to justify the soundness of the order by stating that the same was the product of a "long process" dating back to April 23, 1986. The Secre-

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tary had no definite criteria on what would be included in acquistion costs for the purposes of the regulation or under the regulation. He went further and attempted to establish that profit margins had been frozen in Puerto Rico since 1981 by orders of former Secretary Héctor Ramos, all under Regulation No. 45. The overwhelming evidence is that no such regulation existed as confirmed by his immediate predecessor.

The Secretary assumed responsibility for the decision that generated the April 23 orders which included the antipass-through provision of the tax levied by Law No. 5. When asked why the wholesalers were the chosen ones to absorb the tax by regulation, he attempted to justify the action on his own notions of what excessive or handsome profits were. He insisted that it was predetermined that the consumer would not pay the tax. He located the tax in the excessive margin of the big companies. Ortiz-Alvarez had to admit that the solution to the problem was more evidence gathering, more public hearings, and more remedies. On the issue of cost-of-operation determinations for cost accounting in the sale of wholesaler to retailer, he had to admit that acquisition cost, the previous 16 cent-per-gallon excise tax, overhead cost, certain transportation costs, and delivery costs, had to be considered. The record shows that DACO never developed evidence on the last three items mentioned. It was obvious from his testimony that the guidelines for regulation were poor, haphazardly gathered, with the result that there was no hard evidence to sustain the reasonability of the margins set or the placement of the antipass-through provision at the wholesale level. The defendant admitted that even though there were other solutions to the problem, he preferred the chosen options. The witness had to admit that the particular case of TENOCO and COQUI was such that even though charged with excessive earnings, the evidence was to the contrary. The defendant stated that he would force the plaintiffs to operate at a loss by regulation to gain back the "excessive earnings" made in January-March 1986. He had to admit that some of the so-called big companies were losing money. In his opinion, excessive profits are determined by reference to "experience". The witness could not explain to our satisfaction if the operating expenses were to be accounted for before or after the establishment of gross margins of

profit. He claimed to have retroactive price fixing/regulatory power. The witness could not tell what he expected of the order of May 20, 1986 and had to admit that the new excise tax enacted through Law No. 5 had much to do with the actual situation. When asked what accrued as a result of the January 1986 hearings, he admitted that no decision was taken for gross margins of profit. However, three decisions were taken: It was determined that the Law No. 5 tax would not reach the consumer, that the tax would be absorbed by the excessive profits of wholesalers, and that the market, deemed highly disorganized, would be the object of regulation.

We do find that the refining and wholesale gasoline markets in Puerto Rico were at all times up to April 23, 1986 highly competitive. The wholesalers were fiercely competing and the smaller wholesalers (such as CARIBE, TENOCO, and COQUI), were increasing constantly their market share. On March 26, 1986 and thereafter, DACO only had the benefit of studies of doubtful value, such as Exhibit 37, Exhibit 1, Exhibit 2, and Exhibit 6. We find , as a matter of fact, that the regulatory/price fixing orders of March 26, April 23, and May 20, were arbitrary, unreasonable, discriminatory, and confiscatory in nature.

Specific Findings Regarding Plaintiffs TENOCO and COQUI

TENOCO and COQUI are principally engaged in the wholesale of gasoline to their clients, the vast majority of whom are retailers who operate independent, unbranded gasoline service stations. These two companies compete in the second tier of the market, that is, as wholesalers-distributors who purchase gasoline from refineries for resale and distribution to retailers. The only supplier of these companies is PHILLIPS. TENOCO began selling gasoline in

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1984; COQUI commenced the sales in 1983. They are the smallest of all wholesale distributors, followed by CARIBE and GASOLINAS/ISLA. TENOCO and COQUI successfully penetrated the distribution market for gasoline at the second wholesale level through aggressive competing pricing, based on streamlined overhead, which allowed them to undersell competitors. TENOCO's share of the business grew monthly and during the month of March 1986, it sold 4.7 million gallons of gasoline, representing over 5% of the wholesale market. TENOCO and COQUI have provided, as acknowledged by the defendant in its April 29, 1986 orders, healthy competition, pursuant to specific legislative intent under 23 L.P.R.A. Secs. 1131-1135.

The April 29, 1986 orders issued by defendant recognized TENOCO and COQUI's contribution to the healthy competition in the market. It was further acknowledged that TENOCO and COQUI never had unreasonable or excessive profits in the first quarter of 1986.

TENOCO and COQUI have no control whatsoever over the final resale price charged to the consumer by the retailers, the latter being independent dealers who set their own prices and determine their own profits.

As a result of the decrease in crude price between January and April, 1986, TENOCO and COQUI, as well as other wholesalers, reduced their wholesale prices, thereby transferring to the next level, the retailers, savings resulting from the reduction in their purchase prices.[15] TENOCO and COQUI have maintained lower prices and passed on to their retailers even greater savings than their competitors. The sale price to retailers of gasoline by TENOCO decreased from $0.96 and $0.97 per gallon for unleaded and leaded gasoline, respectively,

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[15] *See* footnote No. 9.

in January 1986, to $0.74 and $0.75 per gallon in April 1986. The sale price to retailers of COQUI decreased from $0.95 per gallon for both unleaded and leaded gasoline in January 1986 to $0.78 unleaded and $0.79 leaded gasoline.

The immediate effect on plaintiffs of the enactment of the Law No. 5 excise tax was to increase the purchase costs of gasoline from PHILLIPS by $0.0476 per gallon from March 31, 1986, by $0.119 per gallon in April, and by $0.1429 per gallon in May 1986. The effect of the aforesaid increases, together with the price freeze for wholesalers and the tax antipass-through provision resulting from the April 23 and April 29, 1986 orders, has been to create direct losses for TENOCO and COQUI. The cost to TENOCO and COQUI of delivering gasoline to retailers during the week from Friday, May 2, 1986 at midnight, to Friday, May 9, 1986 at midnight, was 83.25 cents per gallon for unleaded and 86.75 per gallon for leaded gasoline. TENOCO in turn sold at $0.80 and $0.81 per gallon for both unleaded and leaded gasoline. They sold 189,544 gallons of unleaded gasoline and 287,316 gallons of leaded gasoline that week and had a direct gross loss of approximately $22,680.85 during that week or about $3,240.12 per day. TENOCO's historical gross margin is 3 cents per gallon. Therefore, plaintiff has suffered a loss of gross earnings at its already reduced volume of $14,305.80 for the first week of May, or $2,043.70 per day. Beginning Sunday, May 11, 1986, the new cost to TENOCO of gasoline delivered to retailers was $0.8725 per gallon for unleaded gasoline and $0.8975 per gallon for leaded gasoline. TENOCO sold gasoline at $0.80 and $0.81 for leaded and unleaded gasoline, respectively, with a loss of $0.725 to $0.975 for every gallon of gasoline sold with additional increased losses. The cost to COQUI of delivering gasoline to retailers was $0.8675 per gallon for unleaded gasoline and $0.8925 per gallon of leaded gasoline. COQUI in turn

sold at $0.78 and $0.79 per gallon of leaded and unleaded gasoline, with a loss of $0.875 and $0.1025 for every gallon of unleaded and leaded gasoline sold, which losses in total and per unit increased as time went by.

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TENOCO and COQUI tried to minimize their loss by attempting to maintain as many of their clients as possible, even though to do so they had to sell at a loss. Being forced to be less competitive, TENOCO and COQUI have further lost clients. TENOCO's volume of business during the month of April was reduced by 891,560 gallons.

During the month of March 1986, TENOCO sold 4,725,413 gallons of gasoline which represents an average of 157,514 gallons per day. Since March, TENOCO's volume of business has decreased to the point that during the full week of May 2 to May 9, the average daily sales were 68,123 gallons, which is a loss of 89,391 gallons per day. During the month of March, COQUI sold 2,186,500 gallons, an average of 70,532 per day, and during the first two weeks in May, the average daily sales were 59,964, that is, a loss of 40,568.

TENOCO and COQUI have been purchasing all of their gasoline from PHILLIPS, which sets its gasoline prices at the levels reported in the Platt's Oilgram Price Report at the Houston and Miami prices, whichever is higher. PHILLIPS further adds the cost of the excise tax imposed by the Law No. 5 excise tax. TENOCO and COQUI have no control on the price they must pay to PHILLIPS, or on the way the formula for determining the excise tax is applied. Yet, TENOCO and COQUI must suffer the increase in price produced by the tax, inasmuch as they are in effect prevented by the orders of April 23, April 29, and May 20, 1986 from adjusting their prices in a logical, cost-related manner. In the ordinary course of business, as it occurred during the once-

existing federal regulations, when the cost of gasoline purchased by TENOCO and COQUI increased, or when taxes were levied on gasoline, the resulting cost increase was normally to be added to the prices quoted to retailers.

As soon as TENOCO and COQUI received information that the second April 23, 1986 order had decreed a freeze in prices which wholesalers charged retailers as of March 31, 1986, they sought to have the order set aside. The Presidents of TENOCO and COQUI and other authorized representatives called defendant Pedro Ortiz-Alvarez and other officials at DACO, and informed them of the hardships such orders would cause TENOCO. Motions to set aside the April 23 order were promptly filed. The Motions to set aside the order of April 23, 1986, as well as the information given to defendant Secretary Pedro Ortiz-Alvarez, emphasize the negative impact of the orders of April 23, 1986. TENOCO and COQUI explained that it was imperative that all wholesalers be allowed to quote in their price the tax and any increases in the price of gasoline to their clients, since they are unable to sell at prices below their costs if they are to remain in business.

Defendants' orders of April 23 and April 29, 1986 forced TENOCO and COQUI to absorb the increase in the cost of gasoline brought about by the Law No. 5 new excise tax, as well as additional acquisition costs by reason of increases in the price of crude. Defendants' actions forced TENOCO to sell gasoline at a loss to the point that at the time of trial, its cash reserves had been reduced from approximately $1,000,000 to $300,000. TENOCO's volume of business was seriously reduced as a result of the challenged orders. After the April 23 orders which retroactively froze prices to those existing on March 31, 1986, TENOCO was forced to sell at the March 31 prices posted by other wholesalers, which prices were under TENOCO's costs. As a result of the April 23, 1986 order, TENOCO lost and is losing substantial

sums of money since April 1986. Defendants had knowledge at all materials times that TENOCO had been forced to sell at less than cost. The May 20, 1986 order subjects this wholesaler to an imprecise remedy that does not correlate to the gasoline market, further sinking TENOCO into a loss pattern without adequate profit.[16]

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The effect of the price fixing/regulatory orders at March 31 levels was to eliminate TENOCO's competitive position in the wholesale market which depended until March 26, 1986 on the free-market forces. TENOCO's potential loss of market share is difficult if not impossible to calculate at this time. For the period May 3 to May 9, TENOCO lost some $29,000. On May 10, 1986, the losses for that day were some $7,000. For the period May 11-12, 1986, the loss was some $11,500 in those two days. The expected loss for the remainder of the month of May was at the same rate as for the period May 11-12, 1986.

TENOCO has further experienced uncertainty on the supply of gasoline from PHILLIPS. Retailers are doubting the company's ability to further supply gasoline. Clients have been lost.

Specific Findings Regarding SHELL/MOBIL

SHELL and Mobil dedicate themselves to the wholesale of petroleum-derived products including gasoline,

[16] During the pretrial conference we inquired from the parties whether the May 20 order gave at least TENOCO the temporary relief it had requested by temporary restraining order as denied by the undersignad. DACO was not able to answer the question. TENOCO claimed that the remedy was totally imprecise. The order did not account for the existing 16-cent-per-gallon excise tax, cost of delivery of gasoline, and the Law No. 5 new excise tax to be factored in as cost before the 8.6-cent-per-gallon margin was determined. If at all, the May 20 order made things worse for the larger companies by setting their profit margin at 3.6 cents per gallon. But see our finding at footnote 12 on this subject.

aviation fuel, and lubricants. SHELL sells its gasoline through approximately 210 service stations, while MOBIL sells through approximately 105. SHELL and MOBIL generate approximately 192 direct jobs and have a capital investment in Puerto Rico of approximately $24,000,000 and $9,000,000, respectively, for which investment they historically expected an appropriate return.

Upon the decrease in the cost of acquisition of gasoline, SHELL and MOBIL passed through this decrease to the retailers, decreasing their prices by 39 cents per gallon, by mid-March 1986.[17] SHELL and MOBIL could have decreased their prices by five additional cents per gallon, but did not do so, upon realizing that the new excise tax would be enacted. Throughout this period, SHELL and MOBIL met with the Secretary of the Treasury, members of the Legislature, and DACO, to advise of the imminent adverse impact of such tax in light of the forthcoming increases in the cost of acquisition of gasoline.

SHELL and MOBIL set the prices of their gasoline to retailers taking into account their cost of acquisition, cost of marine transportation, operational expenses, taxes, a reasonable return of investment to their shareholders, and factors such as inherent risks of the market. Average annual investment in Puerto Rico is close to $5,000,000. SHELL has undergone losses, at times, throughout the years. When the market has so forced it, SHELL has absorbed said losses; when the market has allowed it, SHELL has obtained profits. The average profit margin for SHELL for 1985 was approximately 12.5 cents per gallon. Because of the abnormal market conditions during the first three months of 1986, SHELL had a higher profit margin during January through March of approximately 20 cents per gallon, which would have been reduced by five cents had SHELL not been forced to retain this amount to further study the impact of the new ex-

[17] *See* footnote No. 9.

cise tax.[18] SHELL and MOBIL's profit margin for 1986, under normal conditions, was to be around 14 to 15 cents per gallon.

The 8.6 profit margin that existed under federal regulations was set and revised periodically by the Federal Department of Energy. After federal controls ceased, SHELL began revising its profit margin, as required by the increases in costs. Since at least 1983, SHELL's profit margin has never been 8.6 cents per gallon. SHELL has always provided information to DACO, as requested. DACO had full knowledge that SHELL was not operating under an 8.6 profit margin since 1983.

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The impact on SHELL and MOBIL of the Secretary's April 28, 1986 order was to cause daily losses, after operating expenses and taxes, of approximately $226,000 for SHELL and $123,000 for MOBIL, commencing on the first week of May 1986.

SHELL officials met with DACO's Secretary and its personnel on several occasions, including April 8, 22, 24, and May 5 and 8, 1986. On all such meetings, the impact of the excise tax and the March 26/April 23 orders on SHELL and MOBIL, the trends of increases in costs of acquisition of the products, and the precarious situation of SHELL and MOBIL were discussed. All information necessary to evidence this was provided to DACO, pursuant to its requests, or was volunteered by SHELL and MOBIL.

The special difficulties of SHELL with regard to the excise tax, whose full impact SHELL began to feel before any of the other members of the industry, was fully dis-

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[18] *See* footnote No. 9.

cussed with DACO.[19] DACO's Secretary recognized SHELL's predicament to the point of personally interceding on behalf of SHELL with the Secretary of the Treasury to help SHELL obtain some relief, in the form of an extension of time to pay Treasury the Law No. 5 taxes on these shipments.

Throughout these meetings, DACO's Secretary recognized several times that costs of gasoline had increased significantly; he also recognized the adverse impact of the tax, and repeatedly made assurances that the market would be fully deregulated. Furthermore, the Secretary sought the industry's help in informing the Puerto Rico consumers that prices had to increase. To those effects, the industry, at its own cost, published a full-page advertisement in the newspapers, towards which payment SHELL and MOBIL contributed. The expected relief never came. To the contrary, the order of May 20, 1986, establishing a 3.6-cent gross profit margin plus a five-cent per gallon subsidy, still forces SHELL and MOBIL to operate with daily losses of $110,000 and $59,000, respectively. If the May 20 order remains in effect, it will cause losses of approximately $2.6 Million in three months; $5.2 Million in six months, and $10.4 Million in one year.

Specific Findings Regarding ESSO

ESSO generates 190 direct jobs and more than 1,400 indirect jobs through its retailers' chain and contractors supplying products and services, with an annual payroll and marginal benefits exceeding $7.2 Million, a book value investment in Puerto Rico in excess of $23 Million, and an average new annual investment exceeding $5 Million.

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[19] At least two or three tankers laden with imported gasoline were en route to Puerto Rico at the time of the enactment of the tax. Cost for these shipments did not account for the tax antipass-through provision.

ESSO's corporate policy has always been to have constant communication with DACO and with its officers. The communications with DACO have been in relation to ESSO's retail gasoline operations, including, but not limited to, gross margins, product cost acquisition, operating expenses, sales volumes, prices, and inventories. ESSO has consistently advised DACO that its operating expenses averaged 11 cents per gallon of gasoline. This was admitted by DACO's defendant Secretary Ortiz-Alvarez at trial.

Over the last two years, ESSO has also informed DACO that its historic average gross margin for the retail motor gasoline is 14.5 cents per gallon. When ESSO informed DACO of its historic gross margin and operating expenses, DACO never objected. Consistent with DACO's process of establishing a policy concerning prices of gasoline, information pertaining to cost, operating expenses, and prices was periodically requested from wholesalers. ESSO regularly responded to DACO's request. On February 4, 1981, DACO wrote to ESSO acknowledging ESSO's prices at the dealers' level of 1.3738 per gallon of unleaded gasoline and 1.3738 per gallon of leaded gasoline. On said date, DACO indicated that it was in the process of establishing a policy concerning the desired level of prices

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of gasoline. On May 7, 1981, ESSO informed DACO of its position on DACO's faculty to regulate gasoline prices and stated that DACO had no authority to regulate, since the field was preempted by federal law. On May 12, 1981, ESSO provided DACO with information concerning its prices of gasoline, from which it was obvious that ESSO's gross margin was in excess of 8.6 cents per gallon. DACO never objected, questioned or prosecuted ESSO for reason of said gross margin. On June 10, 1981, ESSO informed DACO of its projections on sales of gasoline, gross, and net margin for the year 1981.

The projections clearly indicated the gross margin to be in excess of 8.6 cents per gallon. DACO never objected the projected gross margin informed by ESSO. In that same letter, ESSO reaffirmed its position in the sense that it was not waiving its preemption allegation by reason of submitting information to DACO.

On September 2, 1982, ESSO notified Undersecretary Nelson Soto that at the moment of termination of federal controls in January, 1981, ESSO's gross profit margin was 10.2 cents per gallon. In addition, ESSO informed DACO that its gross profit margin in September 1982 was approximately 12 cents per gallon, barely recovering operating expenses, and that a margin of not less than 15 cents per gallon was required if and when the conditions of the market would permit it. DACO never questioned, objected, or prosecuted ESSO for reason of its then gross profit margin of 12 cents per gallon, as informed on September 2, 1982, and for its anticipated future gross margin of 15 cents per gallon.

During the year 1985 and up to March 1986, former Secretary Carlos J. López-Feliciano continued the same policy of requesting information regularly on prices, costs, and operating expenses. For fiscal year 1984-1985, ESSO's gross margin as per DACO's own calculations was 15.21 cents per gallon. Net profit before income taxes was 2.91 cents per gallon and 1.60 cents per gallon after tax. As per DACO's data, ESSO's average operating expenses were 12.3 cents per gallon. DACO never objected, questioned or prosecuted ESSO for reason of said gross margin.

As found previously, on March 18, 1986, Law No. 5 was approved by the Commonwealth of Puerto Rico, imposing an excise tax on crude oil and petroleum-derived products, purportedly to reduce the gasoline wholesalers' excessive profits in view of the falling prices of crude oil. This law has no antipass-through provision. Be-

cause of said excise tax, the cost of gasoline to ESSO increased 4.76 cents per gallon during the first ten days of April 1986; 11.90 cents per gallon from April 11 to May 10, 1986, and 14.28 cents per gallon from May 11 to the present. In addition to the new excise tax, the cost of gasoline to ESSO during the same period increased by 14 cents per gallon.

On April 23, 1986, DACO issued its two orders freezing the price of gasoline as of March 31, 1986 and allowing the refineries to fully pass through the new oil excise tax to the wholesalers, forcing the wholesalers to absorb said additional cost retroactively. On April 23, the new excise tax was 11.90 cents per gallon. The April 23, 1986 order had the direct and unequivocal effect of forcing ESSO to sell gasoline to its dealers for a price below its acquisition costs, by reason of which ESSO suffered losses of approximately $1.4 Million through May 20, 1986.

ESSO's management met on various occasions with DACO's Secretary and informed him of the negative effect of the orders of April 23, 1986. Information on ESSO's operating expenses and costs was provided to DACO during said meetings. DACO never objected or questioned ESSO's information and cost data. ESSO was promised relief in those meetings, including deregulation. On May 20, 1986, DACO issued an order repealing the second April 23 order and, among other things, fixing ESSO's gross profit margin at 3.6 cents per gallon. The May 20 order had the direct effect of forcing ESSO to sell gasoline to its dealers at a loss, inasmuch as the same does not consider ESSO's aver-

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age operating expenses of 11 cents per gallon. As a consequence of DACO's order of May 20, 1986, ESSO has daily losses of approximately $33,000. The sale of gasoline to dealers constitutes 95% of ESSO's retail

business in Puerto Rico. ESSO's operating expenses have increased around 40 to 50% since 1981 to the present. ESSO further proved, as SHELL also did, that gasoline wholesale markets in the United States and in Puerto Rico are not comparable in view of the many differences in rental income, marketing structure, market size, average volume per service station, and cost of operating business, among others.

ESSO's external auditors certified that ESSO's gross profit margin for the three months ended March 31, 1986 amounted to 20.05 cents per gallon, but as of May 19, 1986, the day before the issuance of DACO's May 20 order, the average gross profit margin for ESSO during 1986, as certified by ESSO's external auditors, amounted to 14.33 cents per gallon, an amount lower than its historic gross profit margin.

ESSO did not have excessive gross profit margin during the first quarter of 1986.[10] In any event, by May 19, 1986, the gross profit margin was under its historic amount. Therefore, the May 20, 1986 order did not correspond to the economical reality of ESSO. The May 20, 1986 order, inasmuch as it gives ESSO a gross profit margin of 3.6 cents per gallon, an amount well below ESSO's historic margins, all in view of its known average operating expenses of 11 cents per gallon, resulted confiscatory in nature. The May 20, 1986 order, inasmuch as it compels ESSO to sell gasoline with a profit margin which leaves a deficit of approximately 8.0 cents per gallon for non-recuperable operating expenses attributable to the selling of the gasoline, is arbitrary, capricious, and unreasonable, and deprives ESSO of property without due process of law.

The gross profit margin fixed for some wholesalers at 8.6 cents per gallon in the May 20, 1986 order was based

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[10] *See* footnote No. 9.

on the erroneous view by DACO that said margin was in effect as per the pertinent federal regulation as of January, 1981. (ESSO's margin at that date was 10.2 cents per gallon). The 8.6 margin was not based in any of the requirements established in Regulation No. 45, Amendment 1, Article 4.

Price Regulation No. 45, Amendment 1, Article 4, Paragraph h, establishes, *inter alia*, reasonable profit margin at the different distribution levels as a criteria for price and maximum profit margin orders. It specifically calls for "reasonable profit margin for operation expenses." The May 20 order obviously does not consider ESSO's average operating expenses of 11 cents per gallon, inasmuch as the established gross margin in the order was 3.6 cents per gallon for ESSO. We further find once again, and based on ESSO's evidence, that the gasoline industry in Puerto Rico is highly competitive. The gasoline wholesalers are all different. Costs, operating expenses, and prices are dissimilar, causing each of them to be in a different economic position and not necessarily susceptible to identical across-the-board regulation. We are convinced that ESSO, as well as the other wholesaler plaintiffs, exhausted all available extraofficial/administrative avenues with DACO in order to convince the Department to set aside the April 23, 1986 order because of the substantial losses being suffered. DACO maintained the order, but promised deregulation in the immediate future. In view of DACO's failure to act, ESSO filed this action and opted to judicially prosecute its claims abstaining to submit itself to the administrative hearing scheduled for May 12, 1986.

Specific Findings Regarding CARECO

On November 30, 1985, Gulf Petroleum, S.A. merged with Caribbean Gulf Refining Corporation (CARECO). On January 1, 1986, Compañía Petrolera Chevron, Inc. (CHEVRON) also merged with CARECO.

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CARECO currently has a refining division and a wholesale marketing division, each of which is a separate profit center. The refining division lost $14 Million in 1985 and $11 Million in 1984. Eighty-five per cent of CARECO's marketing division's sales consists of gasoline sales to retailers. The marketing division supplies gasoline to 270 retailers, of which 190 operate GULF service stations, and the remaining 80 retailers operate CHEVRON stations. The marketing division owns 165 of the 270 service stations it supplies gasoline to. The marketing division sells approximately 9.5 million gallons of gasoline per month to its retailers.

As a result of the second order of April 23, 1986, DACO set maximum prices at which wholesalers could sell gasoline to the retailers. The maximum prices set were those in effect on March 31, 1986. In the case of the marketing division, the maximum price was set at 80 cents per gallon. At the time of trial, the cost of gasoline to the marketing division was 60 cents per gallon. Additionally, the marketing division had to pay 16 cents per gallon corresponding to a previously-enacted excise tax, plus 14.29 cents per gallon on account of the new tax imposed by Law No. 5, of March 18, 1986. Therefore, the total cost of acquisition of gasoline to the marketing division, at the time of trial, was 90.29 cents per gallon. The administrative expenses of the marketing division solely attributable to the sale of gasoline to its retailers currently amount to 7.5 cents per gallon. Since the marketing division is required to sell its gasoline to retailers at 80 cents per gallon, it is selling it at more than 17 cents below cost.

The May 20, 1986 order issued by DACO established two categories of gasoline wholesalers. Wholesalers in the first category are allowed a maximum gross profit margin of 8.6 cents per gallon, while wholesalers in the sec-

ond category are allowed a maximum gross profit margin of 3.6 cents per gallon. The May 20 order placed the marketing division within the second category. The gross profit margins established by the May 20 order do not take into account the wholesaler's administrative expenses. Since the marketing division's administrative expenses are 7.5 cents per gallon, it would suffer a loss, in view of the 3.6-cent margin set by the May 20 order, of 3.9 cents per gallon of gasoline sold. Since the marketing division sells approximately 9.5 million gallons of gasoline per month, it would have monthly losses of $370,000.

The net book value—cost of acquisition less depreciation—of the marketing division's investment directly attributable to the sale of gasoline is $24 Million. The marketing division would have a negative return on investment by selling gasoline at the gross profit margin of 3.6 cents per gallon established by the May 20 order. If the gasoline was to be sold to the retailers at the gross profit margin of 8.6 cents per gallon established by the May 20 order for wholesalers in the first category, the rate of return on investment would then be 2.8% per year. The evidence received is to the effect that the rate of return on the value of the marketing division's investment during the last five years, after taxes, fluctuated between 15 and 20% per year.

During 1985, the marketing division had a gross profit margin of 11 cents per gallon and, in 1984, the profit margin was 10 cents per gallon. Rental income derived by the marketing division from the 165 service stations referred to before amounts to approximately $1 Million per year. Taking into account the aforementioned rental income, the marketing division's rate of return on investment when calculated using the gross profit margin of 3.6 cents would still be negative. If calculated using the 8.6-cent gross profit margin, the rate of return, after taxes, would only be 5% per year. The evidence established that the reasonable rate of return on a riskless in-

vestment, such as U.S. Treasury Bills, currently stands at 6.5% per year. The minimum fair rate of return on investment in an industry involving risks, such as those present in the oil industry, is 10% per year.

In issuing its April 23 and May 20 orders, DACO disregarded the information provid-

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ed to it in April 1986 by several gasoline wholesalers relating to their profit margins and, instead, relied on statistical data unrelated to that provided by said wholesalers and based on unilateral assumptions. DACO did not have any information concerning CARECO's marketing division's profits for the first quarter of 1986 when it issued its April 23 and May 20 orders.

Special Findings Regarding TEXACO

TEXACO's case was submitted for decision based on a stipulation of facts, Docket Document No. 66, and the legal argument of the plaintiff regarding federal preemption. The stipulation of fact is to the effect that as a result of the April 23, 1986 orders, TEXACO suffered losses caused by the sale of gasoline products below costs. Furthermore, as a result of the May 20, 1986 order, TEXACO, although having an allowed gross margin of profit of 3.6 cents per gallon, said margin would not permit TEXACO to recoup its overhead marketing expenses, according to information submitted by TEXACO to DACO.

Special Findings Regarding PHILLIPS

PHILLIPS' case was submitted for decision based on a stipulation of facts, Docket Document No. 67, and the parties' legal argument regarding federal preemption. The only fact as stipulated regarding this controversy that we find pertinent is that the Law No. 5 excise tax

of March 18, 1986 was allowed to be factored in as part of PHILLIPS' cost on sale of gasoline to wholesalers.

We further find from the evidence received that on March 30, 1981, PHILLIPS challenged DACO's authority to regulate petroleum-derived products and expressly reserved its right to assert said challenge. From March 30, 1981 and until the March 26, 1986 order, DACO did not attempt, directly or indirectly, to regulate or otherwise claim it had authority to regulate, the petroleum-derived products that PHILLIPS purchases or sells in Puerto Rico. From March 30, 1981 to March 25, 1986, PHILLIPS did not notify DACO nor DACO required PHILLIPS to notify, price increases. DACO has never analyzed or studied the profit margins of refineries such as PHILLIPS.

Special Findings Regarding ISLA, GASOLINAS, and CARIBE

ISLA, GASOLINAS, and CARIBE submitted their case on the issue of preemption and entered their voluntary dismissal on all other issues.

CONCLUSIONS OF LAW

Abstention

Defendants have raised the issue of abstention. They request a partial application, since they submitted for resolution the issue of preemption, but state that either under the doctrine of *Burford*, *Younger*, or *Pullman*, this Court should decline to exercise jurisdiction as to the constitutional matters.

In *Burford v. Sun Oil Co.*, 319 U.S. 315, 325, 63 S.Ct. 1098, 1103, 87 L.Ed. 1424 (1943), the Supreme Court held that federal courts should abstain from deciding controversies where, essentially, a review over questions on the merits of state administrative policy rulings would

ensue. C. Wright, A. Miller, E. Cooper, 17 *Federal Practice and Procedure* Sec. 4244 at 482-491 (1978). A *Burford*-type abstention is the most difficult of the abstention doctrines to define and to apply. *See Construction Aggregates Corp. v. Rivera de Vicenty*, 573 F.2d 86, 89 (1st Cir.1978). Generally, it requires a federal court to abstain in order to avoid needless conflict with a state's *administration* of its own affairs. As applied, however, *Burford* requires federal court's abstention when (a) the state legislation establishes a thorough system of judicial review by its state courts, and (b) plaintiff's claim is based predominantly on interpretation of state law, not on the basis of a federal right. *E.g., Alabama Public Service Com'n v. Southern Ry. Co.*, 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1951). To surrender our jurisdiction under the *Burford* guideline, the primary concern is with the "nature of the state regulatory interests in a particular subject matter and the potential

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disruption engendered by federal intervention." *Construction Aggregates Corp.*, 573 F.2d at 90. In the instant case, this Court has considered the impact that the regulatory scheme has on federal constitutional rights. This case does not turn on local law. We are not reviewing DACO's policy choices. Here, the equities do not "strongly point in the direction of litigation exclusively in the state forum." *Construction Aggregates Corp.*, 573 F.2d at 93.

In *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), the Supreme Court held that federalism and comity considerations counsel federal courts to abstain when federal claims "have been or could be presented in ongoing state *judicial* proceedings that concern important state interests." (Emphasis added). *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236-39, 104 S.Ct. 2321, 2327-28, 81 L.Ed.2d 186 (1984). In

Hawaii Housing Authority, state administrative hearings had been held prior to the federal court filing in February 1979. The Court concluded that the administrative proceedings were neither part of a judicial proceeding nor quasi-judicial in nature. *Id.* 104 S.Ct. at 2328. Noting that in February 1979 "no state judicial proceedings were in process," *Id.* at 2328, the Court held:

> Since *Younger* is not a bar to a federal court action when state judicial proceedings have not themselves commenced (citations omitted), abstention for HHA's administrative proceedings was not required.

Id. at 2328.

Here, TENOCO initiated these proceedings by filing on May 5, 1986, a request for injunctive relief. Subsequently, the other wholesalers and refiners filed their claims, and on May 14, 1986, the cases were consolidated. On May 16, 1986, this Court consolidated the hearing for a preliminary injunction with the trial on the merits. Trial was held on May 21, 1986, at 9:00 A.M. There have been no pending state judicial proceedings either prior or subsequent to the federal court filings. In the administrative hearings held before May 1986, DACO acted as a rule-making body in its "quasi-legislative" capacity. It is uncontroverted that the administrative proceedings were not "quasi-judicial" or adjudicatory in nature. Accordingly, *Younger* abstention is inapplicable. *See Hawaii Housing Authority*, 104 S.Ct. at 2328.

As to *Pullman* deferral-type of abstention, we find that the circumstances that ordain such action are not present here. Under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941), when an uncertain or ambiguous state law is challenged as contrary to the United States Constitution, federal courts should not intervene until the state courts have properly interpreted the statute. It is clear that *Pullman* abstention does not apply ". . . if the state law is clear on its

face, or if its meaning has already been authoritatively decided by the state courts, or if the constitutional issue would not be avoided or changed no matter how the statute is construed." C. Wright, *Law of Federal Courts* at 304 (1983).

As distinguished from *Pullman*, DACO's authority under local law to issue the orders is not at issue here. This Court is not resolving this controversy based upon unresolved questions of local concern. DACO's orders are clear on their face, and no additional interpretation is necessary to analyze their constitutionality. *See Hawaii Housing Authority*, 104 S.Ct. at 2327, *citing*, *Wisconsin v. Constantineau*, 400 U.S. 433, 439, 91 S.Ct. 507, 511, 27 L.Ed.2d 515 (1971). Merely because DACO's orders are capable of being reviewed by local courts on some parallel state constitutional provision does not warrant abstention. *Hawaii Housing Authority*, 104 S.Ct. at 2327 n. 4. Abstention is, therefore, inappropriate.

Considerations Regarding
Substantive Due Process

The Commonwealth of Puerto Rico has the police power to regulate in the public interest those matters relating to intrastate commerce. *Comtronics, Inc. v.*

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Puerto Rico Tel. Co., 409 F.Supp. 800, 808-10 (D. P.R. 1975), *aff'd*, 553 F.2d 701 (1st Cir.1977). Puerto Rico's exercise of its regulatory authority is not absolute. Its police power is constrained by the due process clause of either the fifth or the fourteenth amendment of the United States Constitution. *E.g.*, *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n. 5, 94 S.Ct. 2080, 2084, n. 5, 40 L.Ed.2d 452 (1974). DACO's pricing and "profit margin" orders are obviously economic in nature and, thus, subject to the "minimum rationality" or "rational basis" test of substantive due process.

That is, absent a fundamental right or a suspect classification, economic or social regulation is held constitutional when the means are rationally related to legitimate governmental objectives. *See Hodel v. Indiana*, 452 U.S. 314, 331-32, 101 S.Ct. 2376, 2386-87, 69 L.Ed.2d 40 (1981) (equal protection challenge).

In *Nebbia v. People of the State of New York*, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed.2d 940 (1934), the Supreme Court retreated from the judicial interventionism of the *Lochner* era.[21] *Nebbia* involved a substantive due process attack to an order by the Milk Control Board fixing the retail prices of milk. In enacting the statute which expressly authorized the Milk Control Board to fix prices, the state legislature had concluded that increases in production and unfair trade practices in the distribution of milk were causing a dramatic price decrease. The result was an intolerable economic loss to the dairy industry and to the state. The Supreme Court held:

> Price control, like any other form of regulation is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence, an unnecessary and unwarranted interference with individual liberty.

Id. at 539, 54 S.Ct. at 517.

In *Nebbia*, the Supreme Court upheld the price fixing order. Several factors clearly justified a finding of reasonableness. First, the order fixing the price of milk at 10 cents per quart (distribution level) and at 9 cents per quart (retail level) established ". . . a differential which would be just . . ." both to distributors and retailers. *Id.* at 530, 54 S.Ct. at 513. There is nothing in *Nebbia* suggesting that the price differential or the prices themselves, had a confiscatory impact. Second, the milk in-

[21] *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1904).

dustry had a long history of state regulation. *Id.* at 522-23, 54 S.Ct. at 509-10. The state legislature held extensive hearings and concluded that price fixing was the optimal regulatory alternative to combat instability in milk prices. Third, the price fixing order was rationally related to the legitimate purpose of preventing competition from having deleterious market effects. *Id.* at 530, 54 S.Ct. at 513.[22]

A rational relation between an order fixing the prices of natural gas and the state's legitimate purposes of conserving energy and stimulating exploration and development of natural resources figured prominently in *Cities Service Gas Co. v. Peerless Oil & Gas Co., et al.*, 340 U.S. 179, 71 S.Ct. 215, 95 L.Ed. 190 (1950). Since 1913 the Oklahoma Legislature had expressly declared a policy of conserving and regulating natural gas when production exceeded market demand. In *Cities Service Gas Co.*, an Oklahoma commission statutorily authorized to set prices, found that natural gas in the Guymon-Hugoton Field was selling below its real economic value. Accord-

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ingly, it fixed wellhead prices of natural gas at 7 cents per thousand cubic feet, in comparison to the market value of natural gas which stood at 3.6 to 5 cents. *Id.*

[22] Among the leading cases on this matter are: *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973) (sustaining North Dakota statute which restricted the practice of pharmacy); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed.2d 563 (1955) (upholding state law restricting optometry); *Lincoln Federal Labor Union, et al. v. Northwestern Iron and Metal Co.*, 335 U.S. 525, 69 S.Ct. 251, 93 L.Ed. 212 (1949) (sustaining state laws banning "yellow dog" contracts); *United States v. Carolene Products Co.*, 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938) (rejecting due process attack to federal prohibition of interstate shipment of "filled milk"); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937) (upholding minimum wage legislation for women).

at 181, 183, 71 S.Ct. at 217, 218. The Supreme Court held:

> In the proceedings before the Commission in this case, there was *ample evidence* to sustain its finding that existing low field prices were resulting in economic waste and conducive to physical waste. That is a sufficient basis for the orders issued. It is no concern of ours that other regulatory devices might be more appropriate, or that less extensive measures might suffice. Such matters are the province of the legislature and the Commission. (Emphasis added).

Id. at 186, 71 S.Ct. at 219. *See also Minnesota v. Clover Leaf Creamery, et al.*, 449 U.S. 456, 470 n. 2, 101 S.Ct. 715, 727 n. 2, 66 L.Ed.2d 659 (1981) (upholding state legislation prohibiting retail sale of milk in plastic, non-returnable containers on the ground that the law served the purpose of energy conservation). More recently, in *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978), the Supreme Court upheld on procedural and substantive due process grounds, a California law which restrained automobile manufacturers-franchisors from adding car dealerships to market areas of existing franchisees.[23] Even assuming anticompetitive effects from the legislation, California had the "police power . . . to *subordinate* the franchise rights of automobile manufacturers to the conflicting rights of their franchisees where necessary to prevent unfair or oppressive trade practices." (Emphasis added). *Id.* at 107, 111, 99 S.Ct. at 411, 413. In that sense, complainants never had a right to be free from state economic regulation. *Id.* at 114, 99 S.Ct. at 414 (Blackmun, J., Powell, J., concurring). Since the statute also afforded procedural due process safeguards, the regulatory scheme was held reasonable. Id. at 106-08, 99 S.Ct. at 410-11.

[23] In 1923, California first adopted special regulations applicable to dealers and car manufacturers. *New Motor Vehicle Bd.*, 439 U.S. at 103 n. 6, 99 S.Ct. at 408 n. 6.

An analogous case is *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978). Responding to the petroleum shortage of 1973, Maryland enacted a law prohibiting out-of-state producers and refiners of petroleum products from operating their retail gasoline service stations within the state. Market surveys had confirmed that inequities in the distribution and pricing of gasoline by the producers and refiners were having the effect of decreasing the competitiveness of the retail market. Exxon was an out-of-state "producer or refiner" of gasoline. It also owned and operated 36 retail service stations in Maryland. Because the statute compelled Exxon to discontinue operating its 36 stations, it claimed, among others, substantive due process violations.[24] The Supreme Court disagreed with Exxon:

> [R]egardless of the ultimate economic efficacy of the statute, we have no hesitancy in concluding that [the law] bears a reasonable relation to the State's legitimate purpose in controlling the gasoline retail market, and we therefore reject appellants' due process claims.

Id. at 124, 98 S.Ct. at 2213.

Not surprisingly, the modern Court has adopted a "hands-off" approach to economic due process. G. Gunther, *Cases and Materials on Constitutional Law* at 450 (10th ed. 1980). According to Professor Tribe, a deferential standard of review:

> [w]ould hardly justify wholesale abdication to the political process, since there exists no type of legis-

[24] Because Exxon was not prohibited from *leasing* its stations to independent dealers, *i.e.*, had other "uses" for the "property," the state court held, 279 Md. 410, 370 A.2d 1102, 1117-18 (1977), that the divestiture provisions did not constitute an unconstitutional "taking." The Supreme Court did not reach this issue.

lation that can be guaranteed in advance to leave important constitutional principles unimpaired, and

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there is simply no way for courts to review legislation in terms of the Constitution without repeatedly making difficult substantive choices among competing values, and indeed among inevitably controverted political, social, and moral conceptions.

L. Tribe, *American Constitutional Law* at 452 (1978). Several commentators have advocated a more active judicial role over economic decisions affecting constitutionally-protected interests. An author has suggested, in economic due process cases, a stronger showing from the state that it had a basis for believing the rationality of the law. *See* G. Gunther, *Cases and Materials on Constitutional Law* at 451 n. 2. In reviewing regulatory decisions under the Administrative Procedure Act, it has been proposed that 1) the state's factual findings must have a basis in the record, and 2) the agency's ultimate policy choice must be reasonable. M. Garland, *Deregulation and Judicial Review*, 98 Harv. L. Rev. 507, 532-34 (1985). Another scholar has recommended that a state must adopt the less restrictive economic means available to accomplish its objectives. G. Struve, *The Less Restrictive-Alternative Principle and Economic Due Process*, 80 Harv. L. Rev. 1463 (1967).

The challenged regulatory schemes in the economic due process cases had an aura of "reasonableness." Most regulatory schemes described above, of course, have imposed direct economic costs on individual property interests. Some of the regulations have also operated as artificial market restraints. But none of these cases have involved a confiscatory "taking" of property without due process. In *National R.R. Corp. v. Atchinson, Topeka Co.*, 470 U.S. 451, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985), the Supreme Court sustained on substantive due

process grounds the constitutionality of a federal reimbursement requirement. The reimbursement obligation had an impact on the complaining railroads because they had to incur substantial costs to compensate Amtrak for certain employee pass privileges. It surely would have been a different case if the reimbursement expenditures had amounted to actual operating losses. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922), the Court warned "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." This Court concludes that the economic burdens imposed by state regulation in the "minimum rationality" cases, did *not* unduly interfere with or destroy the settled financial expectations of the parties, to wit, a reasonable rate of return on investment. *A fortiori*, more rigorous judicial scrutiny for some kind of economic legislation is not foreclosed by these cases. When there is a clear showing that the regulatory scheme *as applied*, has confiscatory impacts, "wholesale abdication to the political process," L. Tribe, *American Constitutional Law* at 452, is constitutionally unwise. *See Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380, 391-92, 94 S.Ct. 2315, 2323-24, 41 L.Ed.2d 141 (1974) (rate regulation). In *Ferguson v. Skrupa*, 372 U.S. 726, 729, 83 S.Ct. 1028, 1030, 10 L.Ed.2d 93 (1963), quoting *Tyson & Brother, etc. v. Banton*, 273 U.S. 418, 445, 446, 47 S.Ct. 426, 433, 433, 71 L.Ed. 718 (1927) (Holmes J., dissenting), the Supreme Court acknowledged:

> [T]he proper course is to recognize that a state legislature [or regulatory agency] can do whatever it sees fit to do unless it is *restrained by some express prohibition in the Constitution of the United States* or by the State, and that courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that one particular court may happen to entertain. (Emphasis added).

In no uncertain terms, the fifth amendment of the United States Constitution prescribes ". . . nor shall private property be taken for public use, without just compensation." The "taking" clause applies to the states via the fourteenth amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239, 17 S.Ct. 581,

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585, 41 L.Ed. 979 (1897). If the state regulation operates as a "taking" of a "property" interest, the state must afford "just compensation". Here, DACO does *not* seriously dispute that a private party's reasonable expectation of a return on investment is a "property" interest within the meaning of the fifth or fourteenth amendment. Our immediate concern is with the meaning of a "taking". This issue is highly factual and depends on several factors. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-07, 104 S.Ct. 2862, 2874-75, 81 L.Ed.2d 815 (1984). Those are: 1) the economic impact of the regulation, 2) the character of the state action, and 3) its interference with reasonable investment-backed expectations. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631 (1978). It is settled that mere diminution in property value would not alone establish a "taking." *Id.* at 131, 98 S.Ct. at 2662. But the majority in *Penn Central* does not appear to dispute that ". . . the inability of the owner to make a reasonable return on his property requires compensation under the fifth amendmend." *Id.* at 149, 98 S.Ct. at 2672 (Rehnquist, J., Burger, J., Stevens, J., dissenting).

This principle is well illustrated by *Mora v. Mejias*, 223 F.2d 814 (1st Cir.1955). *Mora* involved a substantive due process challenge to an order by the Secretary of Agriculture of Puerto Rico fixing the maximum wholesale prices of rice, a commodity of first necessity in Puerto Rico. Plaintiffs were rice importers-wholesalers who, after more than two years of civil litigation, had

been criminally charged for violating the order. Before February 25, 1953, millers' prices in the United States charged to Puerto Rican importers were fixed by federal regulations at $12.00 per 100 lbs. for superior quality rice and at $11.60 per 100 lbs. for good quality rice. On February 25, 1953, the federal price controls were removed. Accordingly, the prices of rice in the United States increased to $13.25 and $12.45, respectively. This represented an increase in the acquisition cost of rice for Puerto Rican importers of $1.25/$0.85 per 100 lbs. since the federal controls were removed. The importers still managed, however, profit margins of $0.90/$0.65 under an unregulated market. On March 12, 1953, the Secretary issued an order fixing the wholesale prices (sale prices) at $12.90/$12.25 per 100 lbs., respectively. The Secretary had intended to bring down the prices of rice in the United States. In so doing, the cost of acquisition of rice to the importers exceeded the sale price, thus forcing losses. The First Circuit noted:

> By the order in question the Secretary deliberately set out to subsidize Puerto Rican rice consumers at the expense of the rice importers. . . .

Id. at 818.

The First Circuit also found that the order, as applied, was not seasonal or temporary, and placed the entire rice importing industry in Puerto Rico in a disastrous economic position by forcing sales below cost. Thus, the First Circuit held that the order did not meet the "minimum rationality" criteria of *Nebbia*, and, therefore, was arbitrary, capricious, and unreasonable. Although the Court of Appeals did not entertain a challenge under the "taking" clause, the order could also have been invalidated on that ground. The economic impact of the order was *not* a mere diminution in property value as in *Penn Central Transp. Co.*, 438 U.S. at 131, 98 S.Ct. at 2662. Clearly, its effect was to negate a reasonable rate of re-

turn on investment. That alone constitutes a "taking" justifying "just compensation" under the due process clause. *Id.* at 149, 98 S.Ct. at 2672. Adding to its confiscatory impact, the order also interfered with the rice importers' reasonable "investment-backed expectations", *Id.* at 124, 98 S.Ct. at 2659, that accompanied an unregulated market. It is uncontroverted in *Mora* that upon the lifting of the federal price controls, the rice importers were earning profits, despite corresponding increases in the price of rice abroad. Two months after deregulation, the Secretary of Agriculture quashed plaintiffs' investment-backed expectations with the confiscatory order.

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Turning to the facts of this case, we do not pass upon DACO's other alternatives. We do not attempt to suggest other means available to deal with the controversy. We simply hold that DACO's orders of March 26, April 23, and May 20, 1986, did not consider the equities of all sectors concerned. They were not related to a legitimate purpose of regulating gross margins of profit. The orders obeyed to a promise by the Executive branch of government to maintain the price of gasoline down irrespective of consequences. We do not have a record of hearings by DACO with conclusions directing the Agency that the regulations under attack were constitutionally-acceptable alternatives, no matter how bizarre. There is no minimum rationality to these orders and there is ample evidence to sustain their arbitrariness and politically-motivated purpose. *See Mora v. Mejias*, 223 F.2d at 816, 819. To top it all, parties did not have procedural safeguards, no aura of reasonableness so as to constitute it all an impermissible abdiction or attack to traditional constitutional values. DACO did not consider the impact of its action. The orders' impact is also confiscatory in nature and amounts to a "taking" within the meaning of the fifth or fourteenth amendment. The scene is set to force the plaintiffs to operate losing money

until the defendant evaluates the matter later this year, possibly in August or September. (Testimony of defendant Secretary Pedro Ortiz-Alvarez). Obviously, the subsidy and margins created by the May 20 order are by no stretch of the imagination "just compensation." Even accounting for the subsidy, at least, the majority of the wholesalers are operating under cost. These plaintiffs clearly had reasonable investment-backed expectations in a *de facto* deregulated market with no history of a long process of actual regulation by DACO. This is not a case where plaintiffs simply face a mere diminution in property value. *Cf. Penn Central Transp. Co.*, 438 U.S. at 131, 98 S.Ct. at 2662. Considering how the regulations read and how they are applied, the balance weighs heavily in favor of substantive due process violations of a confiscatory character. We so hold.

Federal Preemption of the Field Absent Emergency or Disruptive Local Market

It is argued that DACO's Regulation No. 45, as amended, and the subsequent temporary orders issued, are preempted by the federal decision to have an unregulated field of petroleum marketing. Plaintiffs' argument is that the Congressional intent is to allow the forces of the market to work without artificial controls. On the other hand, defendants classify the gasoline price control orders they have issued as not preempted, since preemption would have occurred only and if, the Congressional enactment of the Standby Petroleum Allocation Act of 1982 had been signed into law by the President.

We are confronted with a situation where a local, state-law regulation is allegedly preempted by a federal policy that relies on free enterprise, economical notions of supply and demand as the most efficient mechanism to protect the interests of all of those affected by it. There is no doubt that this is the federal policy since the federal government has concluded that "government

intervention in the market does not work, primarily because it cannot deal adequately with all the various factors in a system as complex as the Nation's energy system." The National Energy Policy Plan, 49 Fed. Reg. 30,646, 30,647 (1984).

The controversy requires us to examine the whole trajectory of Congressional, federal interest in the area of supply and demand of crude oil-derived products so as to determine whether Congress, the President, and the executive agency concerned have assumed the burden of deregulating the industry as an affirmative action versus whether we are confronted with a federal inertia which just let the matter vanish from the ambit of federalism into the arms of local, individualized, state interests. *United States v. Smith*, 726 F.2d 852, 859 (1st Cir. 1984).

The doctrine of preemption is a judicially-defined concept which is derived

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from article III of the United States Constitution, *see Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 152-53, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) (preemption may be express or implied). Under this normative frame. the courts have delineated diverse criteria, so to say, under which a state law will be declared invalid if it is either (a) prohibited by the literal and express terms of the Congressional law, *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, ——, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824); (b) the Congress has regulated the field in such a vast and comprehensive way so as to preclude any other state interference, *Fidelity Federal Savings & Loan Ass'n*, 458 U.S. at 153, 102 S.Ct. at 3022; *Warren Trading Post Co. v. Arizona State Tax Com'n*,

380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965) (comprehensive federal regulation—preemption is presumed); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 236-37, 67 S.Ct. 1146, 1155-56, 91 L.Ed. 1447 (1947); (c) preemption will be applied because a conflict is found between the compliance with a federal law versus a state law, *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S.Ct. 1210, 1217-18, 10 L.Ed.2d 248 (1963); or (d) the last type or category of preemption occurs, that is, when a federal decision exists as to affirmatively elect deregulating or a hands-off approach as to best achieve the federal objectives. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178, 98 S.Ct. 988, 1004, 55 L.Ed.2d 179 (1970). Under all these categories, the court's duty is to strike harmony between the federal and the state interests, *County of Suffolk v. Long Island Lighting Co.*, 554 F. Supp. 399, 403 (E.D.N.Y. 1983), *aff'd*, 728 F.2d 52 (2nd Cir. 1984), with the understanding that whenever the "challenged state statute stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the same will be declared preempted. *Maryland v. Louisiana*, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981); *Pac. Gas & Elect. v. State Energy Resources Conserv.*, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983); *Pérez v. Campbell*, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971); *Tousley v. North America Van Lines, Inc.*, 752 F.2d 96, 100 (4th Cir. 1985); *U.S. v. City of Pittsburg*, 661 F.2d 783, 785 (9th Cir. 1981); *Finberg v. Sullivan*, 634 F.2d 50, 63 (3rd Cir. 1980); *L & L Started Pullets, Inc. v. Gourdine*, 592 F. Supp. 367, 371 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 1 (2nd Cir. 1985).

Here, we specifically have to determine whether the federal decision to forego regulation of price controls of petroleum products implies authoritatively a federal determination that the area is best left unregulated. If such is the finding, "in that event [federal action] would have as much preemptive force as decision to regulate."

E.g., Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board of Mississippi, —— U.S. ——, 106 S.Ct. 709, 88 L.Ed.2d 732 (1986); *Arkansas Elec. Co-op Corp. v. Arkansas Public Com'n*, 461 U.S. 375, 103 S.Ct. 1905, 76 L.Ed.2d 1 (1983); *see also Ray v. Atlantic Richfield*, 435 U.S. at 174, 98 S.Ct. at 1002; *City of New York Dept. of Consumer Affairs v. Coney Island Service Station*, 113 Misc.2d 1012, 450 N.Y.S.2d 661, 662 (Sup. Ct. 1982) (decision to remove federal regulations cannot be interpreted as an invitation to the states to impose additional regulations).

The conflict is to be assessed by examining the nature of the activity which the state has attempted to regulate, rather than the method used. *Chicago & N.W. Transp. v. Kalo Brick & Tile*, 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981).

DACO intends to regulate the margins of profit and prices/costs at all levels of distribution of the gasoline market.[25]

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As the matter now stands, it imposes a gross profit margin ceiling of 8.6 cents for wholesalers and 17.7 cents for retailers per gallon of gasoline, with no reference to particular guidelines. This is the nature of the state-regulated activity—prices. This now requires that we move toward the federal activity in this area, and examine the legislative history and the Congressional mandate. To find the "clear intent" of Congress, we need to examine the language and legislative history of the acts. The intent is best determined by an analysis of the language of the statute in question. *E.E.O.C. v. Hernando Bank, Inc.*, 724 F.2d 1188, 1190 (5th Cir. 1984).

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[25] Under a preemption doctrine analysis, local regulations or ordinances have the same standing as state statutes. They all comprise the term "state laws". *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975).

Federal Intervention in the Market: Origins

As all the parties to this suit have stated in their memoranda, the federal intervention in the market of petroleum-derived products was triggered by a world-wide crisis on the supply of the crude oil that moved the nation to recognize that the energy problem was one of national concern. When price controls became effective on May 15, 1973, the oil industry was charging a wide range of prices for its products. *Reynolds Industries, Inc. v. Mobil Oil Corp.*, 741 F.2d 1385, 1386 (Temp. Emer. Ct.App.1984). But the concern of the federal government can be tracked to 1959, when President Eisenhower, advised of the growing dependency of the nation on the imports of crude oil and the principal crude oil derivatives and their derivatives, enacted under Section 232(b) of the Trade Expansion Act of 1962, 19 U.S.C. Sec. 1862(b), a Mandatory Oil Import Program (MOIP). *See* Proclamation No. 3279, 24 Fed.Reg. 1781 (1959), *reprinted in* 1959 U.S. Code Cong. & Ad. News 948. MOIP was intended to reduce the gap between domestic supply and demand, encouraging development of domestic production. This program was amended in 1973 by President Nixon, Proclamation No. 4210, 3 C.F.R. 31 (1974), *reprinted in* 1973 U.S. Code Cong. & Ad. News 3407. These were steps taken by the Executive branch to curtail dependency on foreign imported oil. These steps were not fruitful since the domestic demand of crude kept increasing. During the 1973-74 Organization of Arab Petroleum Exporting Countries' (OAPEC) oil embargo, the U.S. energy market of energy suffered disruptive effects. During the 1970's, the nation suffered major energy crisis.[26] The first steps of the federal gov-

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[26] The natural gas shortage in the winter of 1976-1977, the coal strike in the winter of 1977-1978, the Iranian revolution in 1979, and the Iran-Iraq war in the fall of 1980, caused another major oil supply disruption. All of those experiences have convinced

ernment to deal in this field were initiated by the Executive branch. It was necessary to act due to the crisis and emergency which had been caused. Thereafter, it was realized that controls more than mere quotas were required. These were delineated into allocating crude oil and control of prices. The first attempts in this area were taken by President Nixon under his Economic Stabilization Program[27] creating the Cost of Living Council (CLC), under which the President imposed a comprehensive price freeze on sales prices of all products, 12 U.S.C. Sec. 1901 et seq. (Supp. 1976), 38 Fed.Reg. 1,473, 22,536 (1973); Exec. Order No. 11,695, 38 Fed. Reg. 1473 (1973).[28] This was necessary to curb the clear inflationary trend versus a decline in domestic crude oil production, 38 Fed. Reg. 6283 (1973).

At this historical stage, Congress enacted the Emergency Petroleum Allocation

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Act, in response to the national energy crisis created by the Arab oil embargo of 1973 and the ensuing petroleum products' shortages. 15 U.S.C. Secs. 751-756 (1973). Under this legislation, it was fully recognized that to deal effectively with the energy crisis, the authority to do so rested on the Executive branch. There it was stated:

Congress of the need for prior preparation and planning to provide a quick and predictable response to any particular emergencies facing the United States.

[27] Created by the authorization of the Economic Stabilization Act of 1970, 12 U.S.C. Sec. 1904 note (Supp. 1976), expired on April 30, 1974, pursuant to section 218 of that Act.

[28] These were subsequently superseded, as is the history with all the subsequent regulations in this field, when under the Emergency Petroleum Allocation Act, *see supra*, at 480, the jurisdiction of the matter was given to the Federal Energy Administration, 39 Fed.Reg. 1924 (1974).

(a) The Congress hereby determines that—

* * * * *

(3) such hardships and dislocations jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare *and can be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government.* (Emphasis added).

15 U.S.C. Sec. 751 (1973).

Therefore, Congress expressly granted to the President of the United States a "*specific temporary authority* to deal with the shortages of crude oil, residual oil, and refined petroleum products or dislocations in their national distribution system." (Emphasis added). 15 U.S.C. Sec. 751(b) (1973).

The United States was experiencing a crisis of energy supplies at all levels. Since no provisions were taken to ameliorate the effects of a shortage of supply, the states' individual acts in this area were not effective. In this frame, Congress had to expressly provide that the acts to be taken by the Executive branch would preempt conflicting state law. 15 U.S.C. Sec. 753. EPAA was due to expire in 1975, but its life was extended pursuant to 15 U.S.C. Sec. 760(a) (1975). This law amended certain provisions of the EPAA and also enacted a new legislation known as the Energy Policy and Conservation Act. 42 U.S.C. Sec. 6201 et seq. This was a product of the Congressional concern and knowledge that the Nation had "entered into a new era in which energy resources previously abundant [would] remain in short supply, retarding [the Nation's] economic growth and necessitating an alteration in [the Nation's] life habits and expectations" and, thus, "*the need for policy deci-*

sions at the national level." H.Rep. 94-340, *reprinted in* 1975 U.S.Code Cong. & Adm.News 1762, 1763. (Emphasis added).

The EPCA also amended 15 U.S.C. Sec. 757 (1975) of the EPAA to expressly authorize the President to exempt, in his discretion, any refined petroleum product from the price and allocation regulations promulgated under EPAA. In so doing, Congress intended *to facilitate a "smooth transition of petroleum markets from a closely regulated state to a largely unregulated status subject only to standby pricing and allocation authority." Id., reprinted* in 1975 U.S.Code Cong. & Ad.News at 1818. (Emphasis added).

The decision as to when to deregulate the market was clearly vested in the Executive branch of the government.

The goal of Congress was a gradual and studied decision so as to return to an unregulated market. The transition to an unregulated market was dependent on the normalization of the market conditions. On August 17, 1979, the Carter administration exempted from the federal price controls the "first sale of heavy crude oil." 44 Fed.Reg. 44,949 (1976). He also directed the Department of Energy to study what other types of heavy crude oil should be exempted from price controls "pursuant to the Emergency Petroleum Allocation Act of 1973." Exec. Order No. 12, 44 Fed.Reg. 48,949 (1979).

The Executive branch kept its Congressionally-delegated role as to observe the forces of the market and to implement liberation from the regulations. On January 28, 1981, President Reagan pronounced that "all crude oil and refined petroleum products are exempted from the price and allocation controls adopted pursuant to the Emergency Petroleum Allocation Act of 1973, as amended." 46 Fed.Reg. 9,909

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(1981).[29] EPAA expired on September 30, 1981. 15 U.S.C. Sec. 760g (1975).

Under the above-referred federal actions in the petroleum market, it is unequivocal that Congress intended to deposit broad authority in the Executive branch to regulate the same. The cardinal principle behind the vested authority was that they should move their actions to achieve a deregulated market in the future. This is reflected in the President's broad statutory authority to change the regulations.

When the first executive order by President Carter was issued, and categories of controlled and uncontrolled petroleum products emerged, various states attempted to acquire regulatory jurisdiction over the exempted products. Two cases are illustrative on this. The first is *Mobil Oil Corp. v. Dubno,* 492 F.Supp. 1004 (D.Conn. 1980), *dismissed in part and aff'd in part,* 639 F.2d 919 (2nd Cir.), *cert. denied,* 452 U.S. 967, 101 S.Ct. 3122, 69 L.Ed.2d 980 (1981).[30] Here was in question a state law which indirectly was regulating the price of gasoline. Even though the state legislation only applied to those petroleum products which had already been exempted from the EPAA, after an exhaustive analysis of the federal regulatory scheme in effect at that time, and of the preemption doctrine, the court concluded that "[s]ection 13(b) of Connecticut Public Act 80-17 is unconstitutional in that it is preempted by federal law and thus violates the Supremacy Clause." *Dubno,* 492 F.Supp. at 1015.

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[29] At said time, it is said that practically all controls had already ended, except those on crude oil. *See* J.M. Sellers, *Decontrol and Regulatory Legitimacy: The Case of the Entitlements Programs,* 37 Adm.L.Rev. 281, 287 (1985).

[30] In *Dubno,* a Connecticut antipass-through tax regulation directed to gasoline wholesalers was declared unconstitutional based on federal preemption.

There, the court emphasized Congress' intention "that price controls represent a temporary departure from the free market norm and that they be implemented so as to disrupt the free market as little as possible." *Dubno*, 492 F.Supp. at 1011. On appeal, the Second Circuit refused to pass upon the claim of preemption stating that the Temporary Emergency Court of Appeals (TECA) had exclusive jurisdiction over the issue. In said case, TECA entered no opinion. However, in an identical controversy involving a New York statute, TECA upheld the declaration of preemption of state price-fixing intervention over the products that had been federally declared exempted. *Mobil Oil Corp. v. Tully*, 499 F.Supp. 888 (N.D.N.Y.1980), *aff'd*, 653 F.2d 497 (Temp.Emer.Ct.App.1981), *vacated and remanded on other grounds*, 455 U.S. 245, 102 S.Ct. 1047, 71 L.Ed.2d 120 (1982).[31]

Under these holdings, the effect of deregulating the prices could only mean that the Executive branch had done a good job and accomplished the goal of a free market. States are not authorized to be an obstacle to the free market; in this sense, they are preempted from acting.

Defendants intend to depart from this type of analysis by arguing that the Congressional enactment of the Standby Petroleum Allocation Act (SPAA) S. 1503 (1982), provided for the preemption of state regulations, especially those which fixed prices. This, they argue, is evidence that said power is not preempted absent Congressional legislation. We do not agree. The SPAA was an intent to provide a supplemental source of authority,

[31] The issue was very similar to the one we deal with now, as to what preemptive effect had the Executive branch's affirmative steps to deregulate the field. The issue was not decided since the case was remanded to the district court. There the case was closed by stipulation. One of the stipulated conditions was that New York would repeal its tax antipass-through statute.

to the Executive, in "the event of a severe petroleum supply shortage." *See* Section 272 of Senate Bill (S. 1503) as amended up to February 22, 1982. The Congressional stand on this matter is restated in the Joint Explanatory Statement of the Committee of Conference, 128 Cong. Rec. H410 (1982).

> In general, it is the intent of the conferees that the decision as to when and to what extent to replace market mecha-
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>
> nisms with mandatory price and allocation program in the petroleum industry is a Federal decision, and State laws that would usurp this Federal role are hereby preempted.

Id. at H415.

Congress' concern was to provide the President/Executive branch with "clear authority to impose allocation and price controls" since they understood that such did not exist after EPAA expired. Conf.Rep. S1503, 97th Cong., 1st Sess. (1982), *reprinted in* 128 Cong.Rec. S1351 (1982). The Congressional preoccupation dealt with:

> [S]tate and local government might feel compelled to act unilaterally to deal with a shortage.
>
> The possibility for such uncoordinated actions already exists. Unless the Federal Government asserts control, the multiplicity of often conflicting State and local laws already on the books could disrupt commerce and exacerbate the impact of a shortage on the Nation as a whole.

Id. at S1352.

Our research has revealed that no state has enacted price controls, laws or regulations. The existing regulation is that states have enacted legislation providing,

inter alia, for broad oil control authority, including allocation, rationing, and conservation authority *during an energy emergency*. Moreover, a substantial number of states have developed draft contingency plans which provide the actual mechanisms for controlling oil under such circumstances. Any energy emergency of sufficient magnitude to trigger a Presidential finding that a severe energy supply interruption exists, would allow action at the state level to bring state oil control authorities and conservation plans into play. Thus, the flow of crude oil and refined petroleum products domestically could be affected by individual state controls. However, it is impossible to predict in advance of an energy emergency, how substantial the impact of such state controls will be.

A detailed study of this matter was undertaken by E. O'Donnell and L. Glassman, *Energy Emergencies: Constitutional Constraints on State Efforts to Control Oil Supplies and Prices*, 5 Energy L.J. 77, 78 (1984). There, it is stated that up to 1982, states enacted statutes providing energy emergency preparedness powers. While the statutes vary considerably in scope and applicability, they usually confer broad authority on the state governors to take extraordinary actions *in response to a declared emergency*. A majority of the statutes (30) permit state governors to take any action they deem necessary to respond to the emergency. Under these statutes, governors are authorized to establish oil allocation programs (including priorities), impose rationing mechanisms, implement price controls, regulate oil consumption, and mandate conservation measures. Under these existing state enactments, the Executive branch of the state is provided power/authority to: (a) establish fuel set-aside programs (17 states); (b) establish curtailment priorities (18 states); and (c) authority to establish statewide motor fuel rationing plans (2 states). Eleven states have statutes which are typically worded to require the "fair and equitable allocation of energy resources in a manner designed to avoid undue hardship." Some statutes require equitable distribution of energy supplies among geographic areas.

Most of the statutes are not directed solely to crude oil and petroleum products. Rather, they cover all energy resources. In addition, the statutes are not limited to authorizing allocation and price controls; they generally authorize state governors to approach an energy emergency from many different angles. Thus, for example, a governor may have authority not only to promulgate allocation and price regulations, but also to impose direct demand restraint measures, establish energy conservation programs, and suspend pollution control standards. *See* Energy Emergency Preparedness Availability of Reports, 48 Fed.Reg. 2,996 (1983).

It is a known fact that the SPAA was vetoed by President Reagan. In his veto

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message, the President clearly stated the motives of said action, to wit:

> This legislation grew from an assumption, which has been demonstrated to be invalid, that giving the Federal Government the power to allocate and set prices will result in an equitable and orderly response to supply interruption. We can all still recall that sincere efforts to allow bureaucratic allocation of fuel supplies actually harm our citizens and economy, adding to inequity and turmoil. . . . *What I do not have, do not want, and do not need, is general power to reimpose on all Americans another web of price controls and mandatory allocations.*
>
> . . . Proper preparation beforehand, *and free trade among our citizens afterwards can mitigate these costs, but no magic federal plan can simply make them go away* . . . . (Emphasis added).

Veto Message on S. 1503-Message from the President Received During the Recess, *reprinted in*, 128 Cong.Rec. S2513, S2514 (1982).

Afterwards, the Senate met to decide whether to override the President's veto. After not satisfying the two-thirds' requirement to override, the veto was upheld. One of the reasons brought forward to sustain the veto clearly was not to interfere with the free market forces. *See* 128 Cong. Rec. S2722, S2732 (1982). There it is stated:

> *Let us give the free market a chance:*
>
> Nearly everyone who testified before the Energy Committee emphasized their preference for a greater reliance on free market forces in the event of a future oil supply disruption.
>
> Indeed, there was a fundamental agreement among all parties that the free market can invariably allocate resources more efficiently than any federal bureaucracy.
>
> President Reagan is fully committed to this free market policy, and I would remind my colleagues that it is this policy that has resulted in the present ample supplies and declining prices of petroleum products since the decontrol of oil one year ago. (Emphasis added).

Congress was still interested in providing a fountain of authority for the President. Therefore, a bicameral compromise and a negotiation between the Executive and Congress ensued. This culminated with the enactment of the Energy Emergency Preparedness Act, 42 U.S.C. Sec. 6281 (1982). This Act was to form part of EPAA.

The Energy and Natural Resources Committee once again restates its "serious concern about the energy emergency preparedness of the U.S." S.Rep. No. 393, 97th Cong. 1st Sess., *reprinted in* 1982 U.S. Code Cong.

& Ad.News 600, 601. In the legislative history of EPAA, *reprinted in*, 1982 U.S.Code Cong. & Ad.News 618-19, the Congress recognized that under energy emergency situations there is no federal preemption provision of those state and local laws that could seriously inhibit operation of market allocation and pricing, "and that could interfere with federal energy emergency responses in the event of an energy shortage." Furthermore, it is the policy of the Department of Energy of the United States (DOE) to encourage state contingency plans. Congress stated that:

> Since DOE did not provide any analysis in support of this statement, the Committee intends that the report required by subsection (b) will provide a more thorough discussion of the basis for DOE's confidence in the willingness of individual States to refrain from exercising emergency powers, and from enacting and implementing petroleum product allocation and pricing laws.

When asked what the Department of Energy was doing to avoid a web of potentially conflicting State regulation, the Department responded that:

> Since we want to help States develop consistent approaches, another part of our strategy is to coordinate with States through providing reliable and timely public information.
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> Because the Administration also believes in Federalism, we do not intend to intrude in State decisions concerning State and local problems. If, however, State actions impede interstate commerce, the Department will work with the Department of Justice to prevent or remove such restrictions.

1982 U.S. Code & Ad. News at 619.

The Energy Emergency Preparedness Act clearly states that the Federal Government intervention will be exercised as to be prepared to deal with any shortage of petroleum. This authority will be used only "as a supplement to reliance on free market pricing and allocation of available petroleum products supplies," 42 U.S.C. Sec. 6281(a). Under this Congressional policy statement, the individual states were allowed to enact their own programs in preparation for petroleum supply interruptions. 42 U.S.C. Sec. 6282(c)(2). This is the concern for need of affirmative preemptive legislation. *See* J. Vlcek, A. Gandara, S. Lewis, V. Boyette, B. Jones, C. Walker, E. O'Donnell, and L. Glassman, *Perspectives on the Appropriate Role for the Federal and State Governments during Petroleum Supply Interruptions*, 16 Nat. Resources Law J. 613, 627-632 (1984).

EEPA was signed into law on August 3, 1982. The President made a public statement to establish his reliance on free market forces:

> Very shortly after taking office, I totally removed remaining regulations on the price, production, and distribution of crude oil and petroleum products. I did this in the sure confidence that the American people, acting through the market system, would move toward optimal means of production and consumption, and I have not been disappointed.

18 Weekly Comp. Pres. Doc. 999 (Aug. 3, 1982). On July 2, 1985, EPCA was extended for four years since its Title I and II are "a basic component of the Nation's preparation for an oil supply disruption." H.R. Rep. No. 152, 99th Cong., 1st Sess. (1985), *reprinted in* 1985 U.S. Code Cong. & Ad. News 86.

In this context, defendant alleges absence of a Congress intent to occupy the field, as further evidenced by the hearing before the Committee on Energy and Natural Resources of the Senate, held on March 7, 1983

(*Oversight Implementation Hearing*).[32] There, the Secretary of the Department of Energy, Donald Paul Hodel, in response to the reiterated Congressional concern as to whether giving express preemption authority to impede fifty piecemeal emergency programs, stated that "DOE is actively working with state and local authorities to encourage *market-oriented energy emergency preparedness planning*."[33] (Emphasis added). *See Oversight Implementation Hearing* at 30. There it was recognized that preemption existed and that, ultimately, recurrence to the courts would ensue as to define its scope. *Id.* at 80-90. There, the Chairman of the Committee stated: "Did anybody notice that the Congress, in the last act that was passed (EPAA), said *rely upon the marketplace to the extent possible. Id.* at 88. *See also Oversight Implementation Hearing* at 294-298, 399-413.

We conclude that since 1973, Congress had delegated to the federal Executive branch the power to control the various problems dealing with oil and its products. This was in recognition that the Executive, through its expert administrative departments and more flexible mechanisms, could deal more efficiently to promote a balanced and mixed energy resource system. The decision was taken with a basic Congressional directive instruction: the regulations should be temporary. *See* 15 U.S.C. Sec. 751(b). The market should return to the

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basic free-enterprise notions of competition, supply and demand forces controlling. The federal concern in this

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[32] The full name given to this hearing was *Oversight of Implementation of the Energy Emergency Preparedness Act of 1983 (Public Law 97-229), with Particular Emphasis on Comprehensive Emergency Response Procedures.* 98th Cong., 1st Sess. (1983).

[33] In this hearing transcript, what is clearly and unequivocally established is Congressional concern with diverse emergency programs. The Executive deponents tried to calm this concern by stating that the President is fully backed up with authority to deal with the situation.

area did not cease to exist with the expiration of EPAA, the federal concern was further achieved. The market was returned to the normal hands-off governmental approach. This federal concern is still existent as to "allow market forces to determine oil prices." *See* "The National Energy Policy Plan", Memo of the Department of Energy, 49 Fed. Reg. 30646, 30651 (1984). Congress intended, as it stated, to effect a "gradual return to an unregulated market," S. Conf. Rep. No. 516, 94th Cong., 1st Sess. 203, *reprinted in* 1975 U.S. Code & Ad. News 1956, 2045, not one regulated by the states. This is how it was before 1973, and this is how it is meant to be in a capitalist democratic society.[34]

At this moment, the Congressional laws that are operative in this field, EPCA and EEPA, are product of history lessons that have marked our society. Our Nation has confronted its dependency on imports of oil with a strategic preparation for eventual disruptions on supply.

Under the previous acts, to wit: EPAA,[35], EPCA [36], and EEPA, Puerto Rico was an actively-regulated party. Caselaw exists on the enforcement of said laws and the regulations issued thereunder in Puerto Rico. *See Bonnaffons v. United States Dept. of Energy*, 646 F.2d 548 (Temp. Emer. Ct. App. 1981); *Longview Refining Co. v. W.R. Shore*, 554 F.2d 1006, 1020 (Temp. Emer. Ct. App. 1977), *cert. denied*, 434 U.S. 836, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977). The most recently-expressed legislative intent in gasoline control in Puerto Rico is that we

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[34] Public debate on these issues has permeated our daily press. Two editorials by The San Juan Star, editions of May 13, 1986 and May 21, 1986, express the predominant public concern. These are made a part hereof as Appendices I and II to this opinion.

[35] 15 U.S.C. Sec. 752(7).

[36] 42 U.S.C. Sec. 6202(4).

also join the trend of a free market operation at this level. *See* 23 L.P.R.A. Secs. 1101-1135.[37]

The conduct that would be preempted is governmental interference with the pricing system absent an emergency situation. DACO's enabling act remains intact. The same applies to the gasoline control laws enacted at 23 L.P.R.A. Secs. 1101-1110. Furthermore, DACO's enabling act, 3 L.P.R.A. Sec. 341e, specifically recognizes that the general broadly-given power to regulate and control prices is to be exercised: (a) when so is justified to protect the consumer from unjustified price increments, (b) to impede the deterioration of the acquisitive power of the consumer, and (c) to protect the economy from the inflationary pressures. What is invalidated as it refers to energy supplies would be the intent to control prices, except in cases of emergency as defined by federal law.

Thus, there are many types of petroleum-related state laws that would not be preempted provided that such laws satisfy the criteria in the above discussion so as to escape preemption. Such laws can be grouped in three categories: (1) those providing the Governor with emergency powers to respond to natural and physical disasters affecting public health and safety; (2) laws that promote energy conservation, or restrain demand for petroleum products at the retail level, but would not significantly impede the operation of the federal allocation program; and (3) laws designed to accomplish regulatory goals unrelated to emergency preparedness, including consumer education and fair trade supervision.

The first category would include those state laws providing for emergency allocation of petroleum products to

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[37] At 23 L.P.R.A. Sec. 1132(b), Puerto Rico's Legislature fully recognized this cardinal economic principle by stating that in the gasoline industry there should prevail commercial practices that promote the free competition.

alleviate a shortage within the state caused by damage to or destruction of facilities located within the United States and resulting from sabotage, accidents, or an act of God.

Examples of laws in the second category are those that promote the conservation of

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petroleum products, such as laws creating state conservation programs pursuant to the Energy Emergency Conservation Act of 1979, provided such programs do not include allocation and price controls. Also included are state laws that restrain retail demand for petroleum products, such as odd-even management programs, minimum purchase requirements, carless day and parking restrictions, fuel switching requirements, car pooling programs, and speed limits. Also, the states' antitrust and taxing laws are not to be affected.

We conclude that Regulation No. 45, Amendment 1, Article 4, and the temporary orders of March 26, April 23, and May 20, 1986, are preempted by the federal Congressional delegated purpose to let the market forces be the sovereign in this field.

JUDGMENT

Based on the foregoing findings of fact and conclusions of law, we hereby determine that the price/regulatory orders of March 26, April 23, and May 20, 1986, are unconstitutional based on the substantive due process and preemption considerations discussed herein. DACO's enabling act, 3 L.P.R.A. Secs. 341-341v, as well as Law No. 228, of May 12, 1942, as amended, 23 L.P.R.A. Secs. 731-746, remain intact. The same applies to Law No. 73, of June 23, 1978, as amended, 23 L.P.R.A. Secs. 1131-1135, which is Puerto Rico's latest expressions of legislative intent in the regulation and control of the gasoline industry. The defendants are enjoined prospectively

from further implementing or enforcing orders fixing prices or margins of profit in the gasoline wholesale and retail business other than in accord with federal law as described in this opinion and order. The mentioned local laws can be implemented to their fullest extent, as long as the implementation is consistent with our findings and conclusions. This opinion and order containing findings of fact, conclusions of law, and judgment, shall be binding on the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

IT IS SO ORDERED.

APPENDIX I

THE SAN JUAN STAR—Tuesday, May 13, 1986

EDITORIALS

The 'magic' tax

The Hernández Colón administration may have come up with the perfect tax. It's called an *arbitrio reductor* which translates roughly into "reducing excise tax."

The virtue of this *arbitrio reductor* is that once imposed on a product it can make the retail price of that product go down rather than up. It's a bit like one of those fad diets that allows you to eat anything you want and still lose weight.

Thus, Consumer Affairs Secretary Pedro Ortíz Alvarez noted in a statement issued Monday that the price of gasoline at the pump actually declined by two cents a gallon since the excise tax on gasoline went into effect. Ortíz added that DACO remains firm in its stand that the new excise tax will not result in price increases to the consumer.

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All of this talk about an *arbitrio reductor* is nonsense, of course. Indeed, the DACO secretary is insulting the intelligence of the Puerto Rican people by trying to pretend that the gasoline excise tax helped bring the price of gasoline down.

The excise tax on gasoline is a cost factor and somebody has to pay it. What's happened is that the administration, through its price regulations, is making the gasoline wholesalers absorb the cost of the excise tax and not letting them pass it along to the consumers.

The administration's price control gambit might win it some votes, but it could have some very negative repercussions over the long run.

First of all, while the heavyweights among the wholesalers may by able to absorb the tax for some time, the same doesn't hold true for the smaller wholesalers with more limited resources. And yet it's these small wholesalers who help hold prices down in the marketplace by underselling the larger distributors. Driving them out of business doesn't make sense from an economic point of view.

Secondly, the administration's stand on this issue is inconsistent with the pro-business image it has otherwise projected and this could hurt its industrial promotion efforts. Here's an administration which has fought to preserve and expand Section 936 and has enacted all kinds of new tax incentives for business. Now, in an about face, the administration insists its ready to go to court to defend its right to regulate prices in the gasoline industry. And all because it's trying to maintain the myth that its *arbitrio reductor* will not affect prices.

The Hernández Colón administration should stop this silly game before it creates total havoc in the island's gasoline industry. Let's lift the freeze on gasoline prices and let the forces of the marketplace do their job.

APPENDIX II

THE SAN JUAN STAR—Wednesday May 21, 1986

EDITORIALS

A befuddlement

To call the government's latest move in the gasoline price saga a puzzlement would be an understatement. Perhaps befuddlement would be a more apt description.

In a new order issued Tuesday, the Consumer Affairs Department offered some relief to the island's gasoline wholesalers through a complex system of credits or subsidies, ranging from 5 to 10 cents per gallon. The "bad guys" who allegedly overcharged

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consumers when gasoline prices were dropping will get the smaller subsidy.

The bottom line is that the government will be able to keep retail gasoline prices at their present levels without driving the companies that produce and sell gasoline out of business.

It all began with an oil excise tax that became law earlier this year. At the time, the price of crude oil was dropping rapidly but not so the price of gasoline to consumers which was dropping much more slowly. So the administration, in effect, told the gasoline wholesalers that they would have to absorb the cost of the new tax because their failure to pass along savings to consumers had brought them excess profits.

Naturally, the gasoline wholesalers protested. Their protests became a lot louder as the price of crude oil—and gasoline—began to climb again in the world market. Not only were the wholesalers absorbing the cost of the new tax, but now they couldn't even pass along their

higher product costs to consumers because a gasoline price "freeze" was in effect.

So the administration was faced with a predicament. Lifting the freeze would mean higher gasoline prices and a violation of the pledge to keep prices down. But maintaining the freeze could drive some firms out of business.

The administration's answer was its system of credits or subsidies. But this raises a number of questions.

• Daco says the program of credits is only "temporary." But in government, "temporary" solutions often tend to become permanent, as in the case of the 45 percent hike in water rates.

• Does Daco really have the trained personnel required to administer such a complex program? For starters, we think they'll need a small army of accountants.

• Finally, the program defies logic. First, the government imposes a tax on the gasoline wholesalers, making them pay money to the government. Then, a couple of months later, the government is offering these same companies credits or subsidies, in effect paying money to them. Does the left hand know, or ever care, what the right hand is doing?

We have a suggestion: the Hernández Colón administration should stop trying to artificially manipulate gasoline prices. If the administration really wants to help the consumer, it can best do so by stimulating competition in the industry and letting the market forces do the work.

ON MOTION FOR STAY PENDING APPEAL

On June 5, 1986, at 4:45 P.M., the defendant filed before this Court a Motion for Stay of Judgment Pending Appeal. Defendant, as Secretary of Consumer Affairs, states that by regulating gasoline sales at the wholesale level he attempted to stop

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said wholesalers from "reaping exhorbitant profits" made in recent months. *See* Motion at 1. We are told that if the injunction is allowed to take effect, consumers will suffer irreparable damages. It is argued that if a stay is granted, plaintiffs will not be significantly injured by their economic loss. Consumers, although not formal parties to this suit, have been in the Court's mind throughout these proceedings, up to this very moment.

At the outset, we state that there are three interests to consider, the government's, the consumers', and the plaintiffs'. The balancing of the interests mentioned has to be seen in light of the facts presented at trial which confirm gross violations of substantive due process considerations. The governmental interest is protected. The Law No. 5 excise tax, 13 L.P.R.A. Sec. 3040C, is being collected. The tax or its validity was not before the Court and, thus, that legitimate governmental interest directed to raising revenue, remains untouched.

The remaining balance is that of alleged irreparable damage to consumers versus actual economic deprivation to plaintiffs. In this sense, our judgment represents a careful consideration of the evidence and the law. We cannot responsibly stay our decision on the basis of the record developed, unless we accept that a watered-down version of the Constitution applies in this jurisdiction. The defendant Secretary's factual and legal course of action after the passage of Law No. 5 was directed solely

to keeping a promise made to the consumers. This Court cannot be an accessory after the fact to such conduct by sanctioning constitutional violations. First Circuit precedent controls. *Mora v. Mejías*, 223 F.2d 814 (1st Cir. 1955).

Fed. R. App. P. 8(a) and Fed. R. Civ. P. 62 govern the issuance of a stay pending appeal. Rule 8(a) requires a federal district court to first examine the merits of such motion. Because a district court has considered the merits of the case and, thus, is most familiar with the record, it is in a position to "exercise the nice discretion" necessary for weighing the equities of such motion. *Cumberland Tel. & Tel. v. Louisiana Public Service Comm'n*, 260 U.S. 212, 219, 43 S.Ct. 75, 77, 67 L.Ed. 217 (1922). The factual record is a critical source for the balancing of interests under Rule 8(a). The defendant Secretary has failed to alert us to the commission of a serious error in evaluating the evidence upon which we entered our findings of fact. As a matter of fact, *defendant has not disputed our findings.* Instead, the Secretary relies on his pretrial view as expressed in his previously-filed memoranda and on conclusory allegations of public injury as grounds for the stay. Here the balancing points to the fact that the defendant Secretary fails to accept that his orders placed the gasoline companies in an absurd economical predicament. In this context, defendant's undefined allegations of injury to the consuming public cannot outweigh the federally-protected constitutional interests and the concomitant expectation of plaintiffs of a reasonable profit and return on investment. *See Martínez Rodríguez v. Jiménez*, 537 F.2d 1, 2 (1st Cir.1976). The defendant Secretary's right to appellate judicial review is not impaired by this Court's order. This is not a case where the "status quo could never be restored." *Providence Journal v. Federal Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir. 1979), *cert. denied*, 444 U.S. 1071, 100 S.Ct. 1015, 62

L.Ed.2d 752 (1980). Our judgment of June 4, 1986 has not affected the legality of the Law No. 5 excise tax. We were careful enough in pointing out to the defendant that DACO's enabling act, 3 L.P.R.A. Secs. 341-341v, as well as Law No. 73, of June 23, 1976, 23 L.P.R.A. Secs. 1131-1135, remained intact and enforceable if not inconsistent with our judgment. As stated in our Opinion and Order, at 97-98, DACO has broad authority to regulate for the benefit of the consumers.

In sum, our factual findings controlled our ultimate decision. Because the equities of this case are strongly in favor of plaintiffs, the defendant Secretary's request for a stay is DENIED. *Ramsdell v. G.H. Cof-*

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fey Company, Inc., 632 F.2d, 162, 163 (1st Cir.1980).

The Clerk will transmit this Order to the Clerk of the United States Court of Appeals for the First Circuit by Panafax.

IT IS SO ORDERED.

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
APR 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 86-1406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,
Petitioners,

v.

ISLA PETROLEUM CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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BRIEF FOR RESPONDENTS IN OPPOSITION

JAIME SIFRE-RODRIGUEZ
LUIS SANCHEZ-BETANCES
SANCHEZ-BETANCES & SIFRE
Banco Central Building
Suite 700
Hato Rey, Puerto Rico
00917-1866
(809) 756-7880

NOEL S. GONZALEZ-MIRANDA
MARIO L. PANIAGUA
SWEETING, GONZALEZ & CESTERO
Banco Central Building
Suite 400
Hato Rey, Puerto Rico
00917-1866
(809) 756-7150

DONALD B. CRAVEN *
MARK L. EVANS
JAMES P. TUITE
MILLER & CHEVALIER, Chartered
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5701
(202) 626-5800

Attorneys for Respondents Esso Standard Oil Co. (P.R.) and Caribbean Gulf Refining Corporation

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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QUESTION PRESENTED

Whether the Energy Policy and Conservation Act of 1975—which amended the Emergency Petroleum Allocation Act of 1973 to deregulate petroleum markets and to require market forces alone to set prices after September 1981—preempts a Puerto Rico regulation that interferes directly with market forces by fixing prices and profit margins on sales of gasoline.

STATEMENT PURSUANT TO RULE 28.1

Because of their length, the lists of companies affiliated with respondents Esso Standard Oil Co. (P.R.) and Caribbean Gulf Refining Corporation, as required by Rule 28.1 of the Rules of this Court, is set forth as an Appendix, *infra*, pp. 1a-26a.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1406

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,
Petitioners,

v.

ISLA PETROLEUM CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

In March, April, and May 1986, the Puerto Rico Department of Consumer Affairs ("DACO") adopted orders regulating prices and gross margins on sales of gasoline in Puerto Rico. The United States District Court for the District of Puerto Rico enjoined petitioners from implementing or enforcing the orders on the ground that they were preempted by federal law prescribing unregulated petroleum markets.

Petitioners appealed to the Temporary Emergency Court of Appeals ("TECA"), a specialized Court established by Congress to assure swift and uniform application of energy regulatory legislation. That Court affirmed. Applying the principles of *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 106 S. Ct. 709 (1986), TECA held that Puerto Rico's gasoline price regulation "clearly conflicts with and frustrates Congress' goal of allowing market forces to regulate the supply and price of petroleum products." Pet. App. 13a-14a.

A. The Puerto Rico Regulation

Puerto Rico law purports to empower the Secretary of DACO in specified circumstances to fix prices and margins on sales of goods in Puerto Rico. 23 L.P.R.A. § 734; 3 L.P.R.A. § 341e. In Price Regulation No. 45, as amended in 1976, DACO prohibited price increases on sales of gasoline and other petroleum products except upon 15 days' advance written notice to the Secretary. Pet. App. 37a.

The regulation was suspended for the duration of federal price controls and remained dormant thereafter until March 1986. In that month, the Puerto Rico Legislature imposed a new excise tax on crude oil and refined petroleum products imported into Puerto Rico. 13 L.P.R.A. § 3040C. The Legislature intended for the petroleum industry to bear the economic burden of the new tax without passing it on to consumers. Pet. Supp. App. 21-22.[1] To carry out that purpose, DACO issued the series of orders whose validity is at issue in this case.

First, on March 26, in an effort to activate the advance-notice provision of Regulation No. 45, DACO specifically directed each petroleum company to give 15

[1] "Pet. Supp. App." refers to the Supplemental Appendix to the Petition for a Writ of Certiorari, which reproduces the District Court's opinion in this case.

days' prior notice of any proposed increase in the price of gasoline. Pet. App. 42a-45a.

Second, on April 23, while authorizing refiners to pass through to wholesalers the cost of the new gasoline excise tax, DACO froze wholesale prices at the levels charged on March 31, 1986. Pet. App. 46a-48a. The result, as the District Court found, was that wholesalers were required "to sell below their acquisition cost of gasoline on a current basis." Pet. Supp. App. 26.

Third, on May 20, after the complaints in this case had been filed and just one day before trial was to begin, DACO rescinded the April 23 price freeze and established in its place a regime of maximum gross profit margins for gasoline wholesalers. Pet. App. 49a-57a. ("Gross profit margins" under the order meant the difference between selling price and acquisition cost without any consideration of operating and other expenses. *See* Pet. App. 52a-53a.) The order limited wholesalers to a gross margin of 8.6 cents per gallon. Those whose average margins had exceeded 8.6 cents per gallon during 1986 were limited to 3.6 cents per gallon until their average for the year reached 8.6 cents. Pet. App. 52a-53a.

The May 20 order did not eliminate the confiscatory effects of the April 23 order. Respondent Esso's average operating costs, for example, were 11 cents per gallon. Pet. Supp. App. 46, 48. The District Court found that, by limiting Esso's average gross margin to 8.6 cents per gallon for 1986, "[t]he May 20 order had the direct effect of forcing ESSO to sell gasoline to its dealers at a loss." *Id.* at 48. *See also id.* at 51-52 (similar findings as to respondent Caribbean Gulf).

B. Proceedings Below

1. All the gasoline refiners and wholesalers in Puerto Rico filed actions in the District Court seeking declaratory and injunctive relief. After a three-day trial, the District Court issued comprehensive findings of fact and conclusions of law. Holding that the DACO orders were

repugnant to the United States Constitution, the Court enjoined petitioners from further implementing or enforcing orders fixing gasoline prices or profit margins. Pet. Supp. App. 86-87. The Court rested its decision on two independent grounds.

First, by forcing gasoline wholesalers to operate at a loss, the orders at issue both lacked the minimum rationality required by due process and constituted an impermissible taking without just compensation, in violation of the Fifth or Fourteenth Amendment to the Constitution. Pet. Supp. App. 57-67.

Second, by purporting to regulate gasoline prices and profit margins, the orders unlawfully interfered with the Congressional purpose in the Energy Policy and Conservation Act of 1975 ("EPCA"), which amended the Emergency Petroleum Allocation Act of 1973 ("EPAA") to provide for gradual but total deregulation of petroleum prices. Pet. Supp. App. 67-86. Congress intended in the EPCA to free petroleum markets from all government regulation—"to let the market forces be the sovereign in this field." *Id.* at 86. The District Court ruled that, except for emergency responses to severe petroleum supply disruptions (*see id.* at 85-86), the federal policy of deregulation takes precedence over and preempts state regulatory schemes that would "be an obstacle to the free market." *Id.* at 76.

2. DACO and the Secretary filed concurrent appeals to TECA and to the United States Court of Appeals for the First Circuit. TECA exercised exclusive jurisdiction over the preemption issue, because it implicates the EPAA. Pet. App. 4a-6a. The First Circuit, which has jurisdiction over the remaining issues on appeal, subsequently stayed its own proceedings pending final disposition of this case. *See* Pet. 2 n.1.

TECA affirmed. The Court concluded that Congress, when it decided to end federal petroleum price control

authority, determined "that the best mechanism to combat supply disruptions and the country's reliance on imported oil was to allow market forces to operate freely." Pet. App. 13a. As in *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 106 S. Ct. 709 (1986), "Congress did not intend to give the states the power it has denied the federal government." Pet. App. 17a. On the contrary, here as in *Transco* "Congress intended to establish a market free of *any* government control." Pet. App. 14a (emphasis in original).

Employing traditional principles of "conflict" preemption analysis, TECA concluded that the Puerto Rico regulation collides with and therefore must give way to the paramount federal policy of deregulation: "DACO's price controls interfere with and obstruct Congress' goal of letting market forces set prices and allocate petroleum products." Pet. App. 17a.

The dissenting judge did not dispute the majority's reading of the Congressional free-market purpose. In his view, however, that should not be enough to foreclose the States from regulating. He would have required evidence that Congress expressly considered the role of the States and specifically decided to prohibit them from interfering with market forces. Pet. App. 20a-21a. He sought to distinguish the contrary holding in *Transco* on the ground that the deregulation in that case was partial rather than total. Pet. App. 24a-26a. In his view, preemption was justified in *Transco*, not (as this Court there stated) because Congress meant to free natural gas from government regulation, but because Congress revised and perpetuated an otherwise comprehensive federal regulatory scheme. *Id.* at 25a.

TECA subsequently denied, without dissent, a petition for rehearing and suggestion for rehearing *en banc*. Pet. App. 28a.

ARGUMENT

Further review of TECA's decision is not warranted.

1. This Court held in *Transco*, slightly more than a year ago, that federal deregulation preempts state regulation if Congress intended market forces alone to set the price of the deregulated product. This case raises no new issue. It involves only an application of *Transco* to the federal deregulation of petroleum markets. Indeed, this case differs from *Transco* in only two material respects, each of which fortifies TECA's preemption holding. First, instead of the partial deregulation in *Transco*, this is a case of total deregulation, in which Congress chose to rely exclusively on market forces to determine the price of all petroleum products. Second, in contrast to the State's indirect and incidental interference with the market in *Transco*, the Puerto Rico regulation here directly obstructs market forces by overtly fixing prices and profit margins.

2. The result in this case turns on the intent of Congress when it decided in 1975 to terminate federal price controls. That question of legislative purpose lies peculiarly within the specialized competence of TECA, a Court created specifically to provide authoritative interpretations of the very statutes at issue here. This Court has rarely reviewed TECA decisions. There is no reason to review this one.

3. TECA's decision is manifestly correct. Its reading of the 1975 Congressional purpose—scarcely challenged by petitioners in this Court—is fully supported by the statute's design and legislative history.

4. Contrary to petitioners' contention (Pet. 11-24), TECA's decision does not conflict with *Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982), a pre-*Transco* summary remand in which this Court neither considered nor addressed the 1975 Congressional purpose or its effect on post-decontrol preemption.

5. Although any preemption holding has potential implications for other jurisdictions, no state or local government aside from Puerto Rico has made any effort to regulate petroleum prices since the termination of federal controls. Puerto Rico's gasoline price control scheme is therefore the only regulation directly affected by TECA's decision.

6. The District Court, rejecting petitioners' arguments to the contrary (*see* Pet. 10, 26), specifically found that "the refining and wholesale gasoline markets in Puerto Rico" were at all relevant times "highly competitive." Pet. Supp. App. 37. It may well be that market conditions in Puerto Rico, just as in every jurisdiction, are in some sense "unique." Pet. 10. But that does not entitle Puerto Rico, any more than it would Hawaii or any other State, to a special exemption from the preemptive scope of federal law.

7. Finally, there is no occasion in this case to consider "what future state activity is prohibited" (Pet. 26) by the federal policy of free-market pricing. The price controls here are a direct affront to that policy. Whether States may regulate the petroleum industry in ways that "peripherally" affect prices (Pet. 26) is not before the Court.

In the sections that follow, we address in greater detail petitioners' argument that Puerto Rico should be free to regulate the price of gasoline, notwithstanding the federal decision to establish unregulated petroleum markets.

I. PUERTO RICO'S GASOLINE PRICE REGULATION CONFLICTS WITH THE CONGRESSIONAL PURPOSE TO ALLOW MARKET FORCES TO DETERMINE PETROLEUM PRICES

A. A Federal Decision to Terminate Regulatory Authority Is Preemptive if It Implies a Decision to Leave the Area Unregulated

It has long been the rule that state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *accord International Paper Co. v. Ouellette*, 107 S. Ct. 805, 811 (1987). The question in this case is whether Puerto Rico's gasoline price regulation frustrates the purpose of Congress in deregulating petroleum markets. This Court's decision in *Transco*, which considered for the first time the preemptive effect of federal deregulation, dictates the framework for analysis here.

At issue in *Transco* was the validity of a Mississippi "ratable-take" order requiring a pipeline to purchase natural gas proportionally from all the owners of a common pool. In the Natural Gas Policy Act of 1978, Congress had revoked the jurisdiction of the Federal Energy Regulatory Commission to regulate wellhead sales of the relevant category of natural gas. The State argued, just as petitioners argue here, that the termination of federal authority removed the only barrier to the State's exercise of its historical police powers, leaving no federal jurisdiction with which the ratable-take order could conflict. *See* 106 S. Ct. at 716.

This Court rejected the State's argument. It held that "[t]he proper question is not whether FERC has affirmative regulatory power over wellhead sales of [the] gas, but whether Congress, in revising a comprehensive federal regulatory scheme to give market forces a more significant role in determining the supply, the demand, and the price of natural gas, intended to give the States the

power it had denied FERC." *Id.* at 717. The Court reiterated that "'[a] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much preemptive force as a decision *to* regulate.'" *Id.*, *quoting Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 384 (1983) (emphasis in original).

In examining the legislative intent, the Court in *Transco* concluded that "Congress denied FERC the power to regulate affirmatively . . . because it wanted to leave determination of supply and first-sale price to the market." 106 S. Ct. at 717. "In light of Congress' intent to move toward a less-regulated national natural gas market, its decision to remove jurisdiction from FERC cannot be interpreted as an invitation to the States to impose additional regulations." *Id.*[2]

As in *Transco*, preemption in this case does not depend on a perpetuation of federal regulatory authority. As TECA correctly stated, the proper inquiry here, just as in *Transco*, is "whether by removing federal price control authority Congress intended to allow the states to step in and assume price control authority over gasoline," or whether Congress intended instead "to rely on market forces to determine the allocation and prices of petroleum products." Pet. App. 12a, 14a-15a.

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[2] The dissenting Justices concurred on this point. They agreed that the Congressional purpose was "to eliminate governmental controls on the wellhead price of [the] gas" and that "State regulation that interferes with this purpose is pre-empted." 106 S. Ct. at 722. They did not agree, however, that Mississippi's regulation impeded "the operation of the free market." *Id.* at 723. In their view, "a ratable-take rule applied to a common pool promotes, rather than inhibits, the efficiency of a competitive market." *Id.* In the present case, by contrast, there is no dispute over the impact on market forces. As petitioners themselves concede (Pet. 6), Puerto Rico's regulation "explicitly" fixes gasoline prices and profit margins.

Petitioners accuse TECA of "revers[ing] the traditional presumption" (Pet. 4) and holding that "state law is preempted unless Congress expresses an intent to allow its operation" (Pet. 24). But TECA's preemption analysis was no different from this Court's approach in *Transco*. Petitioners' attack on the decision below is actually a baseless assault on *Transco* itself.

Transco stands for the proposition—faithfully applied by TECA—that, in the context of federal deregulation, the presumption against preemption is overcome by a showing that Congress intended the free market alone to dictate prices. In that situation, state regulation that interferes with the market necessarily "stands as an obstacle to the accomplishment and execution" of the Congressional will and is therefore preempted. *Hines v. Davidowitz*, 312 U.S. at 67. That is a refinement, not an inversion, of the presumption. It has none of the "profound implications" for federalism that petitioners claim to see, nor does it "inject confusion" requiring fresh "[c]larification by this Court." Pet. 24-25. Neither the Court in *Transco* nor TECA below departed in any way from the traditional principles of federal preemption.

B. Congress Intended to Leave Petroleum Markets Unregulated, Not to Invite Decentralized Regulation by the States

In the Energy Policy and Conservation Act of 1975 ("EPCA"), Pub. L. No. 94-163, 89 Stat. 871 (1975), Congress adopted comprehensive policies to enhance the Nation's long-term energy security. Title IV of the Act—the principal focus of this litigation—amended the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. §§ 751-760h, to provide for phased decontrol of petroleum prices, leading gradually to the complete lifting of all regulatory authority in September 1981.[8]

[8] The Act also included provisions to stimulate domestic production of coal and other fuels (42 U.S.C. §§ 6211-6215), to establish the Strategic Petroleum Reserve (42 U.S.C. §§ 6231-6246), to prescribe energy efficiency standards for automobiles, consumer products, and industrial equipment (15 U.S.C. §§ 2001-2012; 42 U.S.C. §§ 6291-6317), to foster federal, state, and industrial conservation programs (42 U.S.C. §§ 6321-6363), and to authorize participation in international energy allocation and conservation plans (42 U.S.C. §§ 6271-6275).

Both the structure of the decontrol amendments and the underlying legislative history reveal an unequivocal Congressional purpose, consistent with the Act's overall objective of energy independence, to achieve "an unregulated [petroleum] market." Pet. App. 13a.

The EPCA decontrol amendments (1) empowered the President to exempt products from regulation, (2) provided that the previously mandatory price and allocation regulations would be subject to the President's discretion after 40 months, and (3) provided for the termination of regulatory power altogether after six years. Congress adopted that system of gradual decontrol and ultimate deregulation to assure "a smooth transition of petroleum markets from a closely regulated state to a large[ly] unregulated status subject to standby pricing and allocation authority." S. Conf. Rep. No. 516, 94th Cong., 1st Sess. 204 (1975).

As petitioners correctly acknowledge (Pet. 12), state regulation of petroleum prices was preempted throughout the decontrol transition period, even with respect to products that had been exempted from federal regulation, and even after President Reagan exempted all products from controls in January 1981. *See Mobil Oil Corp. v. Tully*, 653 F.2d 497 (TECA 1981), *vacated and remanded*, 455 U.S. 245 (1982); *Mobil Oil Corp. v. Dubno*, 492 F. Supp. 1004 (D. Conn. 1980), *aff'd in part, dismissed in part*, 639 F.2d 919 (2d Cir.), *cert. denied*, 452 U.S. 967 (1981). According to petitioners' theory, however, Congress intended, at the moment the six-year transition to deregulation was completed, abruptly to relinquish to the

States the power to reimpose whatever different and potentially conflicting versions of price controls they might choose to adopt.

To impute such an incongruous purpose to Congress is to presume that its painstaking effort to prepare the Nation's economy so gradually for life without regulation was utterly pointless. As TECA concluded, "[i]t is inconceivable" that Congress, in orchestrating this measured approach to deregulation, would have countenanced the prospect, once the goal was reached, "of over 50 individual regulatory schemes operating in the petroleum products markets." Pet. App. 13a.

The legislative record of the EPCA bears out what its provisions imply. The Congressional objective, rooted in considerations of national security, was not merely to restore the pre-1973 status quo, as petitioners suggest (Pet. 23-24), but rather to implement for the first time a bold national energy strategy, whose centerpiece was an unregulated petroleum market free of all government interference.

The decontrol amendments were the product of a hard-fought compromise between the President and the Congress. Initial battle lines were drawn almost a year before enactment of the EPCA. In his 1975 State of the Union Message, President Ford announced an urgent plan to achieve national energy independence by "decontrol[ling] the price of domestic crude oil" as a step toward "reducing our consumption of energy and increasing our production." 11 Weekly Comp. Pres. Doc. 48-49 (Jan. 15, 1975). As Senator Humphrey later stated, "the President contended that decontrol would reduce our oil imports and render us less vulnerable to economic disruption by an Arab oil boycott." 121 Cong. Rec. 41,182 (Dec. 17, 1975).

Congress agreed with President Ford's "underlying thesis" that "the market mechanism constitutes the most

efficient and equitable allocator of resources." H.R. Rep. No. 340, 94th Cong., 1st Sess. 4 (1975). But, fearful of precipitating an inflationary surge or an economic recession, Congress believed that "a gradual return to an unregulated market [was] preferable to sudden decontrol." H.R. Rep. No. 340, *supra*, at 55; *accord* S. Conf. Rep. No. 516, 94th Cong., 1st Sess. 203 (1975). It therefore sought "a conversion" to an unregulated market "in a manner which minimizes the dislocations and impacts of any transition." H.R. Rep. No. 340, *supra*, at 58.

The debate was heated. In Senator Humphrey's words, it was "a process characterized by bitter words between Congress and the President," punctuated "repeatedly by both Presidential and congressional vetoes of energy proposals." 121 Cong. Rec. at 41,182.[4] With EPAA price control authority scheduled to expire soon, "Congress and President Ford were confronted with a difficult choice: They could continue the increasingly acrimonious and seemingly endless debate over decontrol; or they could compromise on the issue of oil prices and clear the way to establishment of a national energy policy." *Id.* at 41,183 (statement of Sen. Humphrey). In the end, "Congress was able to forestall the administration's decontrol scheme and the President was able to forestall a continuation of price controls. Compromise was necessary and compromise we did." *Id.*; *see also* 121 Cong. Rec. 40,715 (Dec. 15, 1975) (statement of Rep. MacDonald).

The President acceded to Congress's insistence that the transition to deregulation be gradual to minimize dis-

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[4] In this highly charged atmosphere, the President vetoed three bills in an effort to extract from Congress as much decontrol authority as possible. 121 Cong. Rec. 5220-21 (March 5, 1975); 121 Cong. Rec. 23,959-60 (July 22, 1975); 121 Cong. Rec. 28,199 (Sept. 9, 1975). Congress, in turn, twice exercised its legislative veto power under the EPAA to reject decontrol programs advanced by the Federal Energy Administration. 121 Cong. Rec. 23,983-84 (July 22, 1975); 121 Cong. Rec. 25,881-82 (July 30, 1975).

locations. In return, Congress yielded to the President's demand for total deregulation. To bridge the gap, Congress gave the President authority in the interim to phase in decontrol through product exemptions.

Only by pretending that the 1975 legislation never happened could one conclude, as petitioners do, that decontrol was a passive event in which Congress merely "permitted a temporary regulatory scheme to expire in its entirety." Pet. 23. As even this brief summary demonstrates, "[t]he legislative history repeatedly confirms" that the EPCA amendments embodied "an affirmative federal decision," reached only after extended debate, "that petroleum product prices [should] be set by the free market." *Mobil Oil Corp. v. Dubno*, 492 F. Supp. at 1012.

It is equally inaccurate to suggest that Congress decided merely to restore the situation "that existed prior to 1973." Pet. 24. On the contrary, both Congress and the President recognized in 1975 that the world had changed permanently and that new, long-term solutions to the Nation's energy problems were required. Congress ultimately settled on a multifaceted plan—including components designed to stimulate domestic production of coal and other fuels, to encourage conservation, and to ensure the efficient operation of the free market—all to the end of reducing the Nation's precarious reliance on foreign oil supplies.

The nucleus of the plan was the deregulatory policy of Title IV. Congress decided to eliminate petroleum price controls, not because they were irrelevant or superfluous, but because they were injurious. It withdrew federal regulatory authority, not because it had lost interest in problems of petroleum price and supply, but because it determined, in TECA's words, "that the best mechanism to combat supply disruptions and the country's reliance on imported oil was to allow market forces to operate

freely." Pet. App. 13a. As one Court explained, "[t]he recognition on the part of Congress that the United States was entering a new era . . . which necessitated a national energy policy belies [the] argument that the 1975 amendment . . . signaled a return to the *status quo ante*, allowing states to regulate freely with regard to petroleum products." *Mobil Oil Corp. v. Tully*, 499 F. Supp. 888, 909 (N.D.N.Y.), *aff'd*, 653 F.2d 497 (TECA 1981), *vacated and remanded*, 455 U.S. 245 (1982).

The circumstances here are therefore analogous to those in *Transco*. Just as Congress in the NGPA gave "market forces a more significant role in determining the supply, the demand, and the price of natural gas" (106 S. Ct. at 717), so too it sought in the EPCA to achieve "a gradual return to an unregulated [petroleum] market." S. Conf. Rep. No. 516, *supra*, at 203. Just as the NGPA revised "a comprehensive federal regulatory scheme" to deregulate certain categories of natural gas (106 S. Ct. at 717), the EPCA's phased decontrol plan "establishe[d] a comprehensive national policy" embracing the deregulation of petroleum prices. S. Conf. Rep. No. 516, *supra*, at 116. In neither case can it fairly be said that the statute "constitute[d] a federal retreat from a comprehensive . . . policy." 106 S. Ct. at 716. In both cases, the statute reflected " 'an authoritative federal determination that the area is best left *un*regulated.' " *Id.* at 717. Here, as in *Transco*, the removal of federal regulations "cannot be interpreted as an invitation to the States to impose additional regulations." *Id.*

C. The Congressional Purpose Is Controlling Regardless of the Form in Which It Is Expressed

Petitioners devote only a perfunctory two-sentence footnote to the 1975 Congressional purpose. Pet. 23 n.34. Rather than facing up to the EPCA's free-market objective, petitioners advance several reasons why this Court should disregard it. None of their contentions has any merit.

1. Petitioners suggest that state regulation can never be preempted by "an expired federal statute." Pet. 8. But Title IV of the EPCA has "expired" only in the sense that it has accomplished its deregulatory purpose. It is no different in that respect from the NGPA provisions in *Transco*. In both cases, Congress, as part of an overall revision of energy policy, affirmatively amended existing statutes to eliminate federal regulatory authority. Treating either the amending or the amended legislation as "expired" and for that reason impotent to preempt state regulation unjustifiably disdains the Congressional will.

A statute that terminates federal regulation in favor of market forces is no less "the supreme Law of the Land" than a statute that adopts new regulation to displace market forces. That is what this Court meant when it said that a decision to leave an area unregulated has "as much pre-emptive force as a decision *to* regulate." *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n*, 461 U.S. at 384; *Transco*, 106 S. Ct. at 717.

Petitioners' contrary argument is at war with the Court's first principle in this area—that "Congressional purpose is of course '"the ultimate touchstone"' of pre-emption analysis." *Wisconsin Department of Industry v. Gould Inc.*, 106 S. Ct. 1057, 1063 (1986), *quoting Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). When Congress decides that market forces should operate freely, the form in which it chooses to express that purpose—whether by relaxing an existing program, partially deregulating, or altogether abolishing a statutory grant of authority—should make no difference to the preemptive effect of its decision.

2. Echoing the dissenting judge in TECA (Pet. App. 20a-21a), petitioners observe that "[n]either the statute nor the legislative history makes any reference to any effect on state law after the statute's expiration." Pet. 13.

The implication is that, when Congress extinguishes a federal program, States should be free to fill the regulatory vacuum unless Congress has made an express determination that there should be no state regulation.

This Court rejected a nearly identical argument in *Transco*. The Supreme Court of Mississippi in that case had concluded that state regulation was not preempted because, when Congress "strip[ped] away federal regulatory authority," it nowhere stated explicitly "that wellhead prices of deregulated gas [must] be left unregulated by the states as well." *Transcontinental Gas Pipeline Corp v. State Oil & Gas Board*, 457 So.2d 1298, 1318 (Miss. 1984), *reversed*, 106 S. Ct. 709 (1986). This Court ruled on appeal, however, that an intent to leave price determinations to the free market is enough to invalidate state rules that interfere with the market. 106 S. Ct. at 717.

Transco thus holds, contrary to petitioners' contention here, that implied preemption applies with equal strength in the case of deregulation as in the case of regulation. When Congress determines that market forces alone should set prices, its purpose necessarily implies that the States must not obstruct market forces. Indeed, in *Transco*, far from defeating preemption, the Congressional silence confirmed that Congress did not intend to permit States to negate the free market by "impos[ing] additional regulations." *Id.*

That inference is even stronger in the present case. The theory behind federal petroleum deregulation was that price controls discouraged domestic production, stimulated domestic consumption, and dangerously increased the Nation's reliance on foreign oil. A potentially conflicting array of state price control regimes would jeopardize the Nation's energy security even more potently than did the uniform system of federal controls.

Where state price regulation would so palpably frustrate the purposes of deregulation, one cannot fairly presume that Congress, by its silence, tacitly authorized it.

3. Petitioners next complain that TECA has constructed a "permanent bar" to state petroleum regulation. Pet. 10. But preemption here is no more "permanent" than it is in any other case. Congress is always free "to return to the States what it has previously taken away." *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 740 (1985). Particularly in the area of energy policy—which continues to command the active attention not only of Congress but also of the Executive Branch through the Department of Energy—there is ample opportunity for Congress to reconsider earlier programs and objectives. So long as the EPCA's deregulatory purpose endures, however, the bar to conflicting state laws remains in place.

4. Finally, petitioners purport to find evidence in "post-EPAA events" that "both Congress and the Executive believe that there was not, and is not now, federal preemption." Pet. 19. TECA thoroughly considered and correctly rejected this argument. Pet. App. 14a-17a. As TECA properly concluded, although there may have been some confusion over the legal effect of federal decontrol, neither the President nor the Congress ever wavered from the EPCA's original purpose to establish petroleum markets "free of any government interference." Pet. App. 17a. "Nothing in the post-expiration legislative and executive actions" indicates "that Congress intended to allow the states to step in and regulate the petroleum products markets after the expiration of federal authority." *Id.*

II. *TULLY* DOES NOT FORECLOSE PREEMPTION

Contrary to petitioners' protracted argument (Pet. 11-24), this Court's decision in *Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982), does not stand in the way of TECA's decision.

The issue in that litigation—which concerned the period *prior* to September 1981—was whether federal law preempted a New York regulation prohibiting oil companies from passing through to their customers the cost of a state gross-receipts tax. TECA ruled that the anti-passthrough regulation was "an instrument of price control and in conflict with the objectives of the program." 653 F.2d at 502. It accordingly affirmed an order of the District Court permanently enjoining enforcement of the regulation. *See* 499 F. Supp. at 891. TECA added, in an aside: "When the statute expires in September 1981, it will signal the end of federal concern in this area." 653 F.2d at 502. The validity of the New York law after September 1981, however, was not before the Court and was neither briefed nor argued by the parties. As TECA accordingly recognized in the present case, its statement in *Tully* constituted "dicta." Pet. App. 15a n.8.

On appeal—the federal regulatory authority having terminated in the meantime—this Court concluded, acting summarily, that "the judgment and injunction are not appropriately framed for this Court to review." 455 U.S. at 248. The problem was that the injunction continued beyond the date that TECA's opinion appeared to justify. "[T]he injunction entered by the District Court and affirmed by TECA did not terminate on October 1, 1981, the date that TECA acknowledged to signal the end of federal concern in the area." *Id.* at 247. Having identified the discrepancy the Court determined that TECA itself should resolve it in the first instance. The Court therefore vacated the judgment and remanded to TECA "for reconsideration in light of the expiration of federal price control authority under the EPAA." *Id.* at 249.

Several passages of this Court's opinion assume, as TECA's opinion itself had assumed, that federal law would not preempt New York's regulation after termination of the federal regulatory program. But petitioners make too much of those statements. The Court's opinion and judgment do not foreclose consideration of the Congressional purpose in the EPCA, nor are they a barrier to TECA's amply supported conclusion that Puerto Rico's price control scheme conflicts with that purpose. This Court had no brief before it in *Tully* that discussed the structure and compelling history of the EPCA, and the Court nowhere addressed either the federal policy underlying the 1975 legislative compromise or the impact of that policy on post-1981 preemption.[8]

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[8] Petitioners themselves point out (Pet. 15) that the issue was not briefed before this Court, even after the Clerk requested the parties' views on whether expiration of the federal program mooted the case. But that does not support petitioners' inference that no party thought there could be post-1981 preemption. On the contrary, all it shows is that no party thought that the post-1981 issue had yet been presented.

On remand to TECA, the oil companies made clear that, in their view, "the federal interest in unregulated petroleum product prices continues beyond October 1, 1981 and that the preemption of the antipassthrough provision did not end on September 30, 1981." Memorandum for Plaintiffs-Appellees at 9, *Mobil Oil Corp. v. Tully*, 689 F.2d 186 (TECA 1982) (Nos. 2-29, 3-30). They explained, however, that the issue had "not [been] presented by the State's appeal [to the Supreme Court] and is not now before [TECA]." *Id.* at 12. They expressed their intention at a later date "to raise before the district court the issue of post-September 1981 preemption." *Id.* at 13.

After TECA remanded the case to the District Court (689 F.2d at 187), the companies moved for summary judgment with respect to the post-1981 period and presented in full their argument that "there is still an affirmative federal energy policy of decontrol of petroleum product pricing with which the anti-passthrough provision continues to conflict." Memorandum for Plaintiffs at 13-14, *Mobil Oil Corp. v. Tully*, No. 80-CV-543 (N.D.N.Y.). The case ultimately was settled before the District Court resolved the issue.

Particularly in light of this Court's subsequent decision in *Transco* addressing the preemptive effect of federal deregulation, petitioners' effort to ascribe preclusive force to this Court's assumptions in *Tully* goes too far. To say that the issue remained open does not imply, as petitioners contend (Pet. 20-24), that *Transco* "overruled" *Tully*. Rather, *Transco* confirmed that the pivotal question in this case is whether Congress intended in 1975 to leave petroleum markets unregulated after federal decontrol.

This Court did not address that issue in *Tully*. TECA—"a court intimately familiar with the intricacies of federal energy regulation" (*Tully*, 455 U.S. at 248)—correctly resolved it here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JAIME SIFRE-RODRIGUEZ
LUIS SANCHEZ-BETANCES
SANCHEZ-BETANCES & SIFRE
Banco Central Building
Suite 703
Hato Rey, Puerto Rico
00917-1866
(809) 756-7880

NOEL S. GONZALEZ-MIRANDA
MARIO L. PANIAGUA
SWEETING, GONZALEZ & CESTERO
Banco Central Building
Suite 400
Hato Rey, Puerto Rico
00917-1866
(809) 756-7150

DONALD B. CRAVEN *
MARK L. EVANS
JAMES P. TUITE
MILLER & CHEVALIER, Chartered
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5701
(202) 626-5800

Attorneys for Respondents Esso Standard Oil Co. (P.R.) and Caribbean Gulf Refining Corporation

* Counsel of Record

APRIL 1987

APPENDIX

APPENDIX

Set forth below, in accordance with Rule 28.1 of the Rules of this Court, are lists of all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of Esso Standard Oil Co. (P.R.) and Caribbean Gulf Refining Corporation.

ESSO STANDARD OIL CO. (P.R.)

A.B.C.—Azienda Briantea Carburanti S.r.l.
Abu Dhabi Company for Onshore Oil Operations
Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Aditivos Orinoco, C. A.
Adria-Wien Pipeline Gesellschaft mit beschrankter Haftung
Aircraft Fuel Supply B. V.
Aishin Sekiyu K. K.
Alberta Products Pipe Line Ltd.
Al-Jubail Petrochemical Company
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Andian National Corporation, Limited
Arabian American Oil Company
Aramco Overseas Company
Aramco Services Company
A/S Futurum
Asakawa Sekiyu K.K.
Asociacion Civil "Academy La Castellana"
Association Petroliere, Belge
Atlas Supply Company
Atlas Supply Company of Canada Limited
Australian Synthetic Rubber Company Limited
Aviation Services Saudi Arabia Limited
Awaji Gas Nenryo Kabushiki Kaisha
Azienda Carburanti Lubrificanti Affini, S. p. A.—Milano (ACLAM)

Azuma Sekiyu K.K.
BEB Erdgas und Erdol GmbH, Hannover
B.W.O.C., Inc.
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K. K.
Bayerische Erdgasleitung G.m.b.H.
Beaverhill Resources Limited
Bel-Air Entreposage S. A.
Brigitta Erdgas and Erdol GmbH, Hannover
Bryan Woodbine Gathering Inc.
Building Products of Canada Limited
Byron Creek Collieries (1983) Limited
Carlew Chemicals Limited
Carnduff Gas Limited
Cary Chemicals Inc.
Castle Peak Power Company Limited
Champlain Oil Products Limited
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chuo Sekiyu Hanbai K.K.
Commercial Polymers Pty. Ltd.
Compagnie d'Etancheite Africaine en Cote d'Ivoire S. A.
Compania Minera Disputada de Las Condes S.A.
Comptoir Auxiliaire du Petrole
Comptoir Oxonnaxien des Combustibles (C.O.C.)
Computer Centrum Groningen B.V.
DFTG Deutsche Flussigerdgas Terminal GmbH
D.O.C. Dutch Offshore Consortium B.V.
Daihatsu Sekiyu K.K.
Daiichi Kouyu K.K.
Daitsu Sangyo K.K.
Demulsificantes Del Orinoco, C.A.
Depot Petrolier du Gresivaudan
Depots de Petrole Cotiers
Depots Petrolier de la Corse
Deudan-Holding GmbH
Deutsche Erdgas Transport G.m.b.H.
Deutsche Transalpine Oelleitung G.m.b.H.
Devon Estates Limited

Dixie Pipeline Company
Dukhan Service Company
E S F Limited
Eagle Kenso K.K.
East Japan Oil Development Company, Limited
East Texas Salt Water Disposal Company
Eastcoast Spill Response Inc.
Eiko Sekiyu K.K.
Elwerath Erdgas und Erdol GmbH, Hannover
Elwerath Erdol und Erdgas AG
Emirates Chemicals Company
Emori Sekiyu K.K.
Emsland-Erdolleitung G.m.b.H.
Energie Marketing Service GmbH (EMS)
Engycalor—Energia Calore S.r.l.
Entrepot Petrolier de l'Aveyron (E.P.A.)
Entrepot Petrolier de Mulhouse (E.P.M.)
Erdgas-Verkaufs-Gesellschaft m.b.H.
Escuela Las Morochas, C. A.
Esso Chemical Alberta Limited
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Italiana S.p.A.
Esso Malaysia Berhad
Esso of Canada Limited
Esso Resources Canada Limited
Esso Reunion
Esso Societe Anonyme Francaise
Esso Standard Tunisie S. A.
Exact Reisebyra A/S
Exxon Capital Corporation
Exxon Chemical Pakistan Limited
Exxon Corporation
Exxon Credit Corporation
Exxon Finance N.V.
Exxon Pipeline Company
Exxon Shipping Company
Exxon S.r.l.

F. T. Giken Kabushiki Kaisha
FALCA S.p. A.
Ferngas Nordbayern G.m.b.H.
Ferngas Salzgitter GmbH
Forjas de Colombia, S. A.
489061 Ontario Inc.
Fuji Kogyo K.K.
Gasunie Engineering B.V.
General Bussan K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.
General Sekiyu Overseas Ltd.
General Shipping Co. Ltd.
General Unyu Kabushiki Kaisha
Geobutane—Lavera
Gewerkschaft Brassert Erdol und Erdgas GmbH
Gewerkschaft Elwerath & Co. GmbH.
Gewerkschaft Erdol-Raffinerie Deurag-Nerag
Gewerkschaft Gute Hoffnung Erdgas und Erdol GmbH
Gerwerkschaft Kuchenberg Erdgas under Erdol GmbH
Goroku Sekiyu K.K.
Grande Ecaille Land Company, Inc.
Groupement Immobilier Petrolier
Groupement Petrolier Aviation
Groupement Petrolier de Nantes
Groupement Petrolier du Finistere G.I.E.
Groupement pour l'Etude d'un Pipeline Bordeaux Toulouse
Hankyu Ferry K.K.
Hannoversche Erdolleitung G.m.b.H.
Hanshin Kyowa Sekiyu K.K.
Hayakawa Sekiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten Kabushiki Kaisha
Hoei Sekiyu K.K.
Hokushin Bussan K.K.

Hokuyu Sekiyu K. K.
Houston Regional Monitoring Corporation
Hydranten-Betriebsgesellschaft
Hydrierwerke Poelitz Aktiengesellschaft
I.C.I.O.M.—S. p. A.—Importazione Carboni Industria Olii Minerali
Imperial Oil Limited
Imperial Pipe Line Company, Limited, The
Inada Ekka Gas Kabushiki Kaisha
Industry Promotion Enterprises Limited
Interprovincial Pipe Line (Alberta) Ltd.
Interprovincial Pipe Line Limited
Interprovincial Pipe Line (NW) Ltd.
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions, Limited
Ivrea Petroli Affini Gas (I.P.A. Gas) S. r. l.
Japan Butyl Company Limited
Japan Coal Liquefaction Development Company, Ltd.
Jersey Nuclear-Avco Isotopes, Inc.
K.K. Aizu General
K.K. Daimaru
K.K. General Sekiyu Hanbaisho
K.K. Genetech
K.K. Heian Sekiyu
K.K. Kanagawa Sekiyu Shokai
K.K. Kyoei Shosha
K.K. Kyowa Sekiyu Service
K.K. Marugo Izumasa Shoten
K.K. Nippatsu
K.K. Standard Sekiyu Osaka Hatsubaisho
K.K. Toko
K.K. Toresen
K.K. Uwano Sekiyu Shokai
K/S Statfjord Transport A/S & Co.
Kabushiki Kaisha Sankyo Plastics
Kai Tak Refuellers Company Limited

Kanto Kygnus Sekiya Hambai K.K.
Karlsruhe-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keihin Kygnus Kabushiki Kaisha
Keiyo Sekiyu Hanbai K.K.
Kenya Petroleum Refineries Limited
Kibo Sekiyu Hanbai K.K.
Kimura Sekiyu Kabushiki Kaisha
Kinwa Sekiyu K.K.
Kobe Port Service Kabushiki Kaisha
Kobe Standard Sekiyu K. K.
Kowa Sekiyu K.K.
Kowloon Electricity Supply Company Limited
Kygnus Ekka Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Marketing Service K.K.
Kygnus Sekiyu K. K.
Kyushu Eagle K.K.
LPL Investments, Inc.
Lakehead Pipe Line Company, Inc.
LEAG Aktiengesellschaft fur luzernisches Erdol
Leco Inc.
Les Docks des Petroles d'Ambes
Limburgsche Maatschappij voor Gasdistributie Limagas N. V.
Long Beach Oil Development Company
Maasvlakte Olie Terminal N.V.
Maasvlakte Coal Terminal B.V.
Maatschappij voor Intercommunale Gasdistributie Intergas N.V.
Maatschappij voor Intercommunale Gasvoorziening in Oost-Brabant "OBRAGAS N.V."
Magota Sekiyu K.K.
Mainline Pipelines Limited
Maple Leaf Petroleum Limited
Maquinas de Coser y Bordar Sigma, S. A.
Marugo Gas K.K.
Mediterranea Bitumi, S. p. A.

MEGAL FINCO
MEGAL GmbH
Meiji Sekiyu K.K.
MESBIC Financial Corporation of Houston
Metro Fuel Co. Ltd.
Mikawa Bussan K.K.
Mittelrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung
Montreal Pipe Line Limited/Les Pipe-Lines Montreal Limitee
NAM—K 7 B.V.
NAM—K 14 B.V.
NAM—K 15 B.V.
NAM/CLOMS—K 8/K 11 B.V.
NAM/CLOMS—L 13 B.V.
N. V. Nederlandse Gasunie
NPC Services, Inc.
Nakabayashi Sekiyu K.K.
Nansei Oil Terminal K.K.
Nansei Sekiyu Kabushiki Kaisha
Native Venture Capital Co. Ltd.
Near East Development Corporation
Nederlandse Aardolie Maatschappij B. V.
Neptune Bulk Terminals (Canada) Ltd.
Nichimo Kabushiki Kaisha
Nichimo Oil (Bermuda) Co., Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nisku Products Pipe Line Company Limited
Nissei Sekiyu Kabushiki Kaisha
Norddeutsche Erdgas-Aufbereitungs G.m.b.H.
Norddeutsche Mineraloelwerke Stettin G.m.b.H.
Norddeutsche Oelleitungs-gesellschaft m.b.H.
Nordrheinische Erdgas Transport Gesellschaft mit beschrankter Haftung
Nord-West Oelleitung G.m.b.H.
Northward Developments Ltd.

Northwest Company, Limited
Nottingham Gas Limited
Office Prive d'Assurances et de Courtages
Offshore Medical Support Limited
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Service Company of Iran (Private Company)
Oil Spill Response Limited
Oil Transport Company (Saudi Arabia) Limited
Oldenburgische Erdol Gesellschaft m.b.H.
107580 Canada Inc.
139675 Canada Limited
Osaka Ashyu Nenryou K.K.
Osaka Propane Gas Hambai Kabushiki Kaisha
Osaka Sekiyu Gas Yuso K. K.
P. T. Stanvac Indonesia
Pars Investment Corporation
Peninsula Electric Power Company Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petroleum Tankship Company, Inc.
Petrosvibri S.A.
Pinpoint Retail Systems Inc.
Pipe Line Services, Inc.
Plantation Pipe Line Company
Polder-Seehafen-Harburg GmbH
Portland Pipe Line Corporation
Primar Ol GmbH
Progas A/S
Raffinerie du Midi S.A.R.L.
Rainbow Pipe Line Company, Ltd.
Redwater Water Disposal Company Limited
Refineria Petrolera Acajutla, S. A.
Renown Building Materials Limited
Rheingas Erdgasleitungs-Gesellschaft m.b.H.
Rochevert Inc.
Rotterdam Antwerpen Pijpleiding (Belgie)
Rotterdam-Antwerpen Pijpleiding (Nederland) N. V.
Ruhrgas Aktiengesellschaft

S.A. du Pipeline a Produits Petroliers sur Territoire Genevois (SAPPRO)
S.C.O.C.—Societa Commerico Olii Combustibili S. p. A.
SEAG Aktiengesellschaft fur schweizerisches Erdol
S.O.P.—Societa Oleodotti Padani S. p. A.
Saitama Sekiyu Hanbai K.K.
Sakurajima Futo K.K.
Sanko Oil Kabushiki Kaisha
Sanyo Sekiyu K.K.
Saraco S. A.
Saudi Arabian Lube Additives Company Limited
Schubert KG
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
Seismic Industries A/S
Senpoku Oil Service K.K.
SERAM Societa per Azioni
Servacar Ltd.
Shehtah Drilling Limited
Shimoka Sekiyu Kabushiki Kaisha
Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K. K.
Shinohara Oil K.K.
Shizuoka Kanesho Hambai Kabushiki Kaisha
Smiley Gas Conservation Limited
Sociedad Anonima "Escuela Campo Alegre"
Sociedad de Inversiones de Aviacion
Sociedad Nacional de Oleoductos Ltda.
Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societa per Azioni Raffineria Padana Olii Minerali-SARPOM
Societe Anonyme de la Raffinerie des Antilles
Societe Anonyme des Hydrocarbures
Societe Anonyme "Produits Lubrifiants de Madagascar" —PROLUMA S.A.
Societe Belge de Transport par Pipeline
Societe Civile de Mustapha Algerie
Societe Civile de Participation pour la Destruction des Dechets Industriels (SOCDI)

Societe Civile Immobiliere "Courcelles-Etoile"
Societe Civile Immobiliere de la Croix au Chene
Societe Civile Immobiliere du 195 Avenue de Neuilly
Societe Civile Immobiliere Khariessa
Societe Civile Immobiliere "Kleber-Etoile"
Societe Civile Immobiliere "Les Casseaux-Bougainville"
Societe de la Raffinerie d'Alger
Societe de la Raffinerie de Lorraine
Societe de Manutention de Carburants Aviation
Societe de Manutention de Carburants Aviation Dakar-Yoff, S. A.
Societe de Promotion et de Financement Touristique (CARTHAGO)
Societe d'Entreposage de San-Pedro
Societe des Pipe-Lines de Strasbourg
Societe des Transports Petroliers par Pipe Line
Societe d'Exploitation & de Developpement d'Operations Commerciales
Societe du Caoutchouc Butyl (SOCABU)
Societe du Pipe Line de la Raffinerie de Lorraine
Societe du Pipe-Line Mediterranee-Rhone
Societe du Pipeline Sud-Europeen
Societe Esso de Recherches et d'Exploitation Petrolieres Esso Rep
Societe Francaise Exxon Chemical
Societe "Geomines-Caen"
Societe Havraise de Manutention de Produits Petroliers
Societe Hoteliere de la Petite Campagne
Societe Immobiliere Paris-Niel
Societe Ivoirienne d'Operations Petrolieres S.A.
Societe Malgache de Raffinage
Societe Reunionnaise d'Entreposage
Socony-Standard-Vacuum Oil Company (Petroleum Maatschappij)
Southern Natural Gas Development Pty. Ltd.
Standard Kosan Kabushiki Kaisha
Standard Oil S.r.l.
Standard Service K.K.

Statfjord Transport A/S
Stockage Geologique de Gaz de Lavera
Suddeutsche Erdgas Transport Gesellschaft mit beschrankter Haftung
Sun East Company Ltd.
Supertex, Inc.
Sydis, Inc.
Syncrude Canada Ltd.
Synergistics Chemicals Limited
System Plaza Kabushiki Kaisha
305120 Alberta Ltd.
TAR-Tankanlage Rumlang AG
TBN Tanklager-Betriebsgesellschaft Nurnberg mbH
Taglu Enterprises Ltd.
Taihei Bussan K.K.
Taiko Sekiyu K.K.
Taisei Kogyo Sekiyu Hanbai K.K.
Takahama Kosan Kabushiki Kaisha
Taketsuru Yugo K.K.
Tanaka Sekiyu Hanbai K.K.
Tankanlage A. G., Mellingen
Tanklager Altishausen A. G.
Tanklager Gesellschaft, Koln
Tanklager-Gesellschaft Tegel
Tanklager Lechelles I S.A.
Tanklager Taegerschen AG
Tecnica Quimica Petrolera, S.A. de C. V.
Tecumseh Gas Storage Limited
THUMS Long Beach Company
Thyssengas G.m.b.H.
TIBA Speditions GmbH
Toa Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Company, Limited
Tohpren Co. Ltd.
Toko Sekiyu K.K.
Tonen Energy International Corp.
Tonen Maintenance K.K.
Tonen Sekiyukagaku Kabushiki Kaisha

Tonen Tanker Kabushiki Kaisha
Tonen Technology K. K.
Toscana Lavorazione Petroli S. p. A.
Towa Compounding Co. Ltd.
Towa Sekiyu K.K.
Toyoshina Film Company, Ltd.
Trans-Arabian Pipe Line Company
Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.
Transgaz Lavera
Tsurumaru Unyu K.K.
Turkish Petroleum Company, Limited
UBAG—Unterflurbetankungsanlage Flughafen Zurich
Union des Raffineurs Belges "U.R.B."
Van Salt Water Disposal Company
W.A.G. Pipeline Pty. Ltd.
Wako Jushi Kabushiki Kaisha
Wako Kasei Kabushiki Kaisha
Wartempomp Nederland B.V.
Westdeutsche Erdolleitungs—G.m.b.H.
Westgas G.m.b.H.
Westgastransport B.V.
Winnipeg Pipe Line Company Limited
Wohnungsbaugesellschaft, Steimbke—Rodewald G.m.b.H.
Worex et Cie
Yasaka Sekiyu K.K.
Yellowstone Pipe Line Company
Yoshiki Sekiyu Kabushiki Kaisha
Yoshimi Gas Kabushiki Kaisha
Yuai Sekiyu K.K.
Yugen Kaisha Nishi Kobe Bosai Center

CARIBBEAN GULF REFINING CORPORATION

American Overseas Petroleum Limited
    American Overseas Petroleum (Spain) Limited
Arabian Chevron Overseas Limited
Arabian Chevron, Inc.
    Saudi Cable Company
Amax Inc.

Bahama California Oil Company
Belize Chevron Oil Company

California (Nigeria), Incorporated
    Chevron Oil Company (Nigeria)
California Asiatic Oil Company
    Chevron Darajat Limited
    Chevron Jambi Inc.
    Chevron Langsa Inc.
    Chevron Natuna Inc.
    Chevron Nauka Inc.
    Chevron Oil Company (Nigeria)
    Chevron Oil Company of Spain
    Chevron Singkarak Inc.
California Ecuador Petroleum Company
Caltex Petroleum Corporation
Cetus Corporation
Chevron do Brasil Participacoes e Empreendimentos Ltda.
Chevron Amazon Petroleum Company
Chevron Australia Transport Pty., Ltd.
Chevron Bahia Petroleum Company
Chevron Bahia Sul Petroleum Company
Chevron Canada Limited
    Chevron Asphalt Limited—Chevron Asphalte Limitee
    Chevron Canada Resources Limited
        Chevron Canada Petroleum Limited
        Glen Park Gas Pipeline Company Limited
        Rimbey Pipe Line Co. Ltd.
        Standard Development Company Limited
        Sultran Ltd.

Chevron Minerals Limited
Cornwallis Arctic Oils Limited
Furnace Oil Sales Ltd.
Irving Oil Company, Limited
Irving Oil Limited
Canaport Limited
Irving California Oil Company Ltd.
Irving Oil Terminals Ltd.
Irving Oil Limited
Canaport Limited
Irving California Oil Company Ltd.
Irving Oil Terminals Ltd.
Standard Oil Company of British Columbia (1981) Limited
Chevron Coal Development Company
Chevron Corporation
Chevron Environmental Health Center, Inc.
Chevron Exploration Corporation
Chevron Exploration Corporation of Chile
Chevron Exploration Corporation of Sudan
Chevron Foreign Service Corporation
Chevron Guaratuba Petroleum Company
Chevron Iguape Petroleum Company
Chevron Indonesia Oil Company
Chevron Industries, Inc.
Chevron Mineral Corporation of Ireland
Chevron International Oil Company, Inc.
A/S Hydrantanlaegget Koebenhavns Lufthavn, Kastrup
Aircraft Fuel Supply B.V.
Chevron Belgium Refining
Chevron Erdoel Handels G.M.B.H.
Caltex Deutschland G.M.B.H.
Chevron Functional Fluids, Inc.
Chevron International Services, Inc.
Chevron International Trading Company—West Africa

Chevron Italiana Marina Aviazione S.P.A.
MARS—Milan Airport Refuelling Services S.P.A.
Seram—S.P.A.
Chevron Oil (Switzerland)
Mittelland Refinery Limited
Saraco S.A.
TAR—Tankanlage Ruemlang A.G.
UBAG—Unterflurbetankungsanlage Flughafen Zurich
Chevron Oil Latin America, Inc.
Chevron Oil Trading Company
Maasvlakte Olie Terminal N.V.
Rotterdam-Antwerpen Pijpleiding (Belgie) N.V.
Rotterdam-Antwerpen Pijpleiding (Nederland) N.V.
Chevron Itajai Petroleum Company
Chevron Land and Development Company
C-W Properties, Inc.
Glenwood Properties
Ontario Center, The
Pacific Coast Homes
Sepulveda Properties, Inc.
Chevron Maranhao Petroleum Company
Chevron Maritime Transport Corporation
Chevron Mineral Corporation of Ireland
Chevron Nile Services Limited
Chevron Oceanic, Inc.
Arabian American Oil Company
Aramco Overseas Company
Aramco Services Company
Trans-Arabian Pipe Line Company
Arabian Chevron Trading Company
Associated Octel Company Limited, The
A.K. Chemie G.M.B.H.
Associated Octel Company (Plant) Limited
Associated Octel Company (South Africa) (Proprietary) L

Octel Societe Anonyme
Societa Italiana Additivi Per Carburanti Spa (S.I.A.C.)
Societe Octel-Kuhlmann
Caltex Mediterranean Limited
Chevron Capital N.V.
Chevron Oceanic (Middle East), Inc.
Chevron Oil and Chemical Company AB
Chevron Oil Company of the Netherlands
Chevron Oil Service Company
Chevron International Oil Company Limited
Chevron Tankship (U.K.) Limited
Hydrant Servicing Company Limited
Quotegem Limited
United Kingdom Oil Pipelines Limited
Chevron Oil (Ireland) Limited
Chevron Petroleum (U.K.) Limited
British Kewanee, Inc.
Kewanee Oil Company (U.K.) Limited
Chevron Exploration North Sea Limited
Chevron Petroleum Company Limited
Chevron Oil, Sociedad Anonima
Eastern Transport Corporation
N.V. Rotterdam-Rijn Pijpleiding Mattschappij
Chevron Oil & Chemical Company Pty. Ltd.
Chevron Oil and Chemical Company Limited
Chevron Oil and Chemical Company Oy
Chevron Oil Company (Ghana)
Chevron Oil Company of Central African Republic
Chevron Oil Company of Chad
Societe D'Etude et D'Exploitation de la Raffinerie Du Tch
Chevron Oil Company of Egypt
Chevron Oil Company of Equatorial Guinea
Chevron Oil Company of Ethiopia
Chevron Oil Company of Gabon
Chevron Oil Company of Germany

Chevron Oil Company of India
Chevron Oil Company of Ireland
Chevron Oil Company of Italy S.P.A.
Chevron Oil Company of Japan
Chevron Oil Company of Kenya
Chevron Oil Company of Korea
Chevron Oil Company of Liberia
Chevron Oil Company of Madagascar
Chevron Oil Company of Mauritius
Chevron Oil Company of Morocco
Chevron Oil Company of Niger
Chevron Oil Company of Portugal
Chevron Oil Company of Senegal
Chevron Oil Company of South Africa
Chevron Oil Company of South West Africa
Chevron Oil Company of Sudan
Chevron Oil Company of Syria
Chevron Oil Company of Thailand
Chevron Oil Company of the Gambia
Chevron Oil Company of the Philippines
Chevron Oil Company of Uruguay
Chevron Oil Company of Yugoslavia
Chevron Oil Company of Yugoslavia (Jabuka)
Chevron Oil Company of Yugoslavia (Mljet)
Chevron Oil Exploration Company of Greece
Chevron Oil Field Research Company
Chevron Orient, Inc.
Chevron Overseas Finance Company
Chevron Oil Company of Venezuela
Tierras e Inversiones Venezuela, C.A.
Compania Petrolera Chevron, Ltd.
Chevron Overseas Petroleum Inc.
Chevron Petroleum Company of Brazil
Chevron Petroleum Company of Colombia
Chevron Petroleum Company of Denmark
Chevron Petroleum Company of Greenland
Chevron Petroleum Company of Norway
Chevron Petroleum Norge A/S

Chevron Petroleum Service Company
Chevron Pipe Line Company
    Chevron Alaska Pipe Line Company
    Chevron Raven Ridge Pipe Line Company
Chevron Porto Belo Petroleum Company
Chevron Research Company
    B.V. Chevron Centrale Laboratoria
    Chevron Do Brasil Ltda.
    Chevron Research Company (Japan) Ltd.
Chevron Sao Luis Petroleum Company
Chevron Sao Marcos Petroleum Company
Chevron Shale Oil Company
Chevron Shipping Company
Chevron Solemar Petroleum Company
Chevron Standard Limited
    Chevron Canada Resources Limited
        Chevron Canada Petroleum Limited
        Glen Park Gas Pipeline Company Limited
        Rimbey Pipe Line Co. Ltd.
        Standard Development Company Limited
        Sultran Ltd.
Chevron Stations, Inc.
Chevron Tankers (Nederland) B.V.
Chevron Telecommunications Company
Chevron U.S.A. Inc.
    American Gilsonite Company
    American Personnel Services Inc.
    Argentine Gulf Oil Company
    Atlas Supply Company
    Australian Gulf Oil Company
    Blakely Oil Company of Arizona
    Bolivian Gulf Oil Company
    Cabinda Gul Oil Company
        Cabinda Gulf Oil Company Limited
    California Company, The
    Canyon Reef Carriers, Inc.
    Chandeleur Pipe Line Company

Chevron Capital U.S.A. Inc.
Chevron Chemical Company
    Aditivos Mexicanos, S.A. de C.V.
    Chevron do Brasil Ltda.
    Chevron Chemical (Canada) Limited
        Cansulex Limited
        Later Chemicals Limited
    Chevron Chemical (Far East) Private Limited
    Chevron Chemical Company S.A.F.
        Deutsche Ortho G.M.B.H.
    Chevron Chemical International Sales, Inc.
    Chevron Chemical International, Inc.
    Chevron Chemical, S.A.
        Chevron Chemical G.M.B.H.
    Chevron International Chemical Company
    Chevron International Chemicals Inc.
    Chevron International Chemicals Ltd.
    Crediton Enterprises, Inc.
    Gulf Chemicals International, Inc.
    Harshaw Chemical Company, The
    Insecticidas Ortho, S.A.
    Internacional de Basicos y Quimicos,
      S.A. de C.V
    Karonite Chemical Company, Limited
    Nippon Petroleum Detergent Company, Limited
    Orogil, S.A.
    Penrith Enterprises, Inc.
    Petrosynthese S.A.
    Quimicas Ortho de California, Limitada
    Ripon Enterprises, Inc.
    Spirolite Corporation
Chevron Geothermal Company of California
Chevron Investment Management Company
Chevron Italia Oil Company S.P.A.
Chevron Oil Finance Company
Chevron Petroleum Company of The Netherlands

Chevron Sulawesi Inc.
Chevron Travel Club, Inc.
    Chevron Travel Club Services Company
CLP Corporation
Douala Gulf Oil Company
Ecuadorian Gulf Oil Company
Federal Engineering Corporation
    Compania Comercial Chevron, S.A.
    Federal Acquisitions, Inc.
Felix Oil Company
Gulf Agricultural Chemicals Company Limited
    Chevron International Trading &
        Transportation Limited
    Gulf (U.K.) Offshore Investments Limited
    Gulf Oil (Great Britain) Limited
        Gulf Oil Refining Limited
            London Oil Refining Co. Limited, The
        London Oil Refining Co. Limited, The
            Lorco Oils (North) Limited
        Lorco Oils (North) Limited
    Gulf Oil (U.K.) Limited
Gulf Asian Investments Company Limited
Gulf Offshore Cameroon Company
Gulf Oil Communications Company, Inc.
Gulf Oil Company—Asia
Gulf Oil Company of Cameroon
Gulf Oil Company of Gabon
Gulf Oil Company-Eastern Hemisphere
    Chevron International Trading &
      Transportation Limited
    Gulf Oil European Company
Gulf Oil Germany Inc.
Gulf Oil Production Company
Gulf Oil Realty Company
    Gulf Reston Properties, Inc.

Gulf Research & Development Company
    Chevron International Trading &
      Transportation Limited
    Gulf Oil Company (Nigeria) Limited
    Plaschem International Co. (Hong Kong)
      Limited
Gulf Tire & Supply Company, Inc.
Gulf West Cameroon Exploration Company
Intermountain Geothermal Company
International Bitumen Emulsions Corporation
Kenai Pipe Line Company
Kewanee Industries, Inc.
    Kewanee Overseas Oil Company
    Netherlands Kewanee, Inc.
Korea Gulf Oil Company
Long Beach Oil Development Company
Murvale Company
Norske Gulf Production Company A/S
Pembroke Capital Company Inc.
Petroleum Facilities, Inc.
Pittsburg & Midway Coal Mining Co., The
    Solvent Refined Coal International, Inc.
Plantation Pipe Line Company
Powell Bend Mining Co.
South Pacific Gulf Oil Company
Standard Gas Company
Standard Gasoline Company
Standard Oil Company
Standard Oil Company of Texas, Inc.
Standard Pacific Gas Line Incorporated
Standard Pipe Line Company
Suriname Gulf Oil Company
Transocean Group, Inc.
    Transinsco, Inc.
Transocean Gulf Oil Company
    Bermaco Insurance Company Limited
        Insco Limited
            Britamco Limited

Caribbean Gulf Refining Corporation
Chevron Caribbean Investments Inc.
Chevron International Limited
Balinesian Gulf Oil Limited
Chevron Barreirinhas Exploration Limited
Chevron Servicos de Petroleo Ltda.
Chevron International (Argentina) Limited
Chevron International (Malaysia) Limited
Chevron International Italy Limited
Chevron International Somalia Limited
Chevron International Trading & Transportation Limited
Chevron International Yugoslavia Limited
Chevron Lng Shipping Company Limited
International Gas Transportation Company Limited
Chevron Transport Corporation
Chevron Product Carriers Corporation
Gulf Fujairah Petroleum Limited
Gulf Musandam Petroleum, Limited
Gulf Offshore Ras Al Khaimah Petroleum Limited
Gulf Oil (Ireland) Limited
Gulf Oil (Nederland) Exploration and Production Company
Gulf Oil of Colombia Limited
Gulf Oil Australia Pty. Ltd.
Gulf Oil Egypt Limited
Gulf Oil Pakistan Limited
Gulf Oil Ras Al-Khaimah Limited
Gulf Oil Shadwan Limited
Gulf Oil Suez Limited
Gulf Oman Petroleum Limited
Kupan International Company Pension Plan Trustees Limited
Natuna Gulf Gulf Oil Limited
New Frontiers Limited

Niugini Gulf Oil Pty. Limited
Sumatra Gulf Oil, Limited
Tunisian Gulf Exploration and Production Company
Chevron International Trading & Transportation Limited
Chevron Marine and Services Company Limited
Chevron Transport Corporation
Chevron Product Carriers Corporation
Eastern Gulf Oil Company Limited
Britama Tankers Limited
Global Energy Operations and Management Company, Ltd.
Gulf (U.K.) Offshore Investments Limited
Gulf U.K. Offshore Exploration Company Limited
Gulf Asian Investments Company Limited
Gulf Kuwait Company
Burgan Pension Fund Trustees Limited
Kuwait Oil Company Limited
Burgan Pension Fund Trustees Limited
Kuwait Oil Company Trustees Limited
Kuwait Oil Company Trustees Limited
Gulf Oil (U.K.) Limited
Britama Tankers Limited
Chevron Chemical U.K. Limited
Gaelic Oil Company Limited, The
Gulf International Trading Company (Europe) Limited
Gulf Oil (Great Britain) Limited
London Oil Refining Co. Limited, The
Gulf Oil Refining Limited
Lorco Oils (North) Limited
London Oil Refining Co. Limited, The
Lorco Oils (North) Limited

Gulf Oil Financial Services Company Limited
Chevron Chemical U.K. Limited
Gulf Oil Terminals (Ireland) Limited
Britama Tankers Limited
Kewanee Oil Company (U.K.) Limited
Silvertown Lubricants Limited
Gaelic Oil Company Limited, The
Gulf International Trading Company (Europe) Limited
Chevron Chemical U.K. Limited
Gulf Oil Financial Services Company Limited
Gulf Oil Refining Limited
Gulf Oil Company (Hong Kong) Inc.
Gulf Oil Company (Nigeria) Limited
Gulf Oil Finance N.V.
Gulf Oil Services, Inc.
Gulf Petroleum, S.A.
Gulf Sales and Supply, Inc.
Gulf U.K. Offshore Exploration Company Limited
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Mene Grande Oil Company
Norwegian Gulf Exploration Company A/S
Plaschem International Co. (Hong Kong) Limited
Venezuela Gulf Refining Company
Warren Petroleum, Inc.
West Texas Gulf Pipe Line Company
Western States Geothermal Company
Zaire Gulf Oil Company
Gulf Oil Zaire S.A.R.L.
Chevron Ubatuba Petroleum Company
Chevron Venezuela Services Inc.
Compania de Petroleo Chevron S.A.
Compania Comercial California S.A.

Compania Comercial Conchan S.A.
Compania Minera Chevron de Espana, S.A.
Compania Minera Chevron, Inc.
Compania Petrolera Chevron
Compania Petrolera Chevron Guatemala
Compania Petrolera Chevron Honduras
Compania Petrolera Chevron Nicaragua
Compania Petrolera Chevron, Inc.
Cornwallis Arctic Oils Limited
Crest Exploration Limited

Dominion Oil Limited

Far Eastern Petroleum Company Limited
Chevron Overseas Petroleum Limited
Borco Towing Company Limited
Freeport Trading Company Limited
Marine Agents and Brokers Limited
Overseas Petroleum Company Limited
Borco Towing Company Limited
Freeport Trading Company Limited
Marine Agents and Brokers Limited
River Nile Petroleum Company Limited
White Nile Petroleum Company Limited

Gasolinas Chevron de Puerto Rico Inc.
Gulf Oil Corporation

Huntington Beach Company
Huntington Pacific Corporation
Huntington Seacliff Corporation
Mansion Properties, Inc.

Iran Chevron Oil Company
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited

Kelmac, Inc.
Ukamar Limited

Oil Insurance Limited
Oil Investment Corporation Ltd.
Oil Investment Corporation Ltd.

P. T. Caltex Pacific Indonesia
Pacific Document Services, Inc.
Pacific Oil Company
Petroleum Buildings, Inc.

Refineria Petrolera de Guatemala-California, Inc.

Socal Oil & Refining Company
Standard Directional Drilling Company
Standard Oil Company
Standard Oil Company of California
Standard Oil Company of Delaware
Standard Oil Company, Inc.
Standard Oil Company, Ltd.
Standard Oil Sales Co., Inc.

UNC Incorporated

Western Company, The
Western Transnav Company

OPPOSITION

BRIEF

NO. 86-1406 (4)

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
October Term, 1986

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, et al.,
Petitioners,

v.

ISLA PETROLEUM CORPORATION, et al.,
Respondents.

ON PETITION FOR CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Igor Domingues
WILLIAM ESTRELLA
LAW OFFICES
Counsel for Texaco
Puerto Rico, Inc.
P.O. Box S-4826
San Juan, Puerto Rico 00905
(809) 721-7481

Rafael Pérez-Bocha*
Néstor M. Méndez-Gómez
Maggie Correa-Avilés
Ana Matilde Nin
Arturo J. García-Solá
McCONNELL VALDES KELLEY
SIFRE GRIGGS & RUIZ-SURIA
Counsel for The Shell Company
(Puerto Rico) Limited,
Mobil Oil Caribe, Inc., and
Phillips Puerto Rico Core, Inc.
G.P.O. Box 4225
San Juan, Puerto Rico 00936
(809) 759-9270

Alvaro E. Calderón, Jr.
Counsel for Isla Petroleum
Corp. and Gasolinas de
Puerto Rico Corp.
P.O. Box 2219
Hato Rey, Puerto Rico 00919
(809) 753-5050

Carlos F. López
Celso E. López
Counsel for Cía. Petrolera
Caribe, Inc.
P.O. Box 8852
Santurce, Puerto Rico 00910
(809) 721-5037

*Counsel of Record

PUBLISHING RESOURCES, INC. SAN JUAN, PUERTO RICO

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Mobil Oil Corp. v. Tully, 653 F.2d 497 (T.E.C.A. 1981) . 9, 15

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H.R. Rep. No. 94-340, 94th Cong., 1st Sess., 1975 *U.S. Code Cong. & Ad. News* 1763, 1817-1818 ..... 8, 9

S. 1503 § 280(a), 97th Cong., 2d Sess., 128 Cong. Rec. H411 (daily ed. Feb. 22, 1982) 10

S. 1503 § 275(a)(1), 97th Cong., 2d Sess., 128 Cong. Rec. H410 (daily ed. Feb. 22, 1982) 10

128 Cong. Rec. S2722 (daily ed. March 24, 1982) 10

128 Cong. Rec. 2514 (1982) 10

S. Rep. No. 393, 97th Cong., 2d Sess. 19, 1982 *U.S. Code Cong. & Ad. News* 615 11

OTHER AUTHORITIES

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RULE 28.1 LISTING

A. The Shell Company (Puerto Rico) Limited

Twenty-nine thousand nine hundred ninety-five (29,995) shares out of 30,000 are owned by The Shell Petroleum Company Limited and the remaining 5 are owned by Asiatic Petroleum Company Limited. Sixty percent (60%) of the outstanding shares of The Shell Petroleum Company Limited are owned by Royal Dutch Petroleum Company and the remaining forty percent (40%) are owned by The Shell Transport and Trading Company. The Shell Petroleum Company Limited is in turn a shareholder or joint venturer with hundreds of operating and service companies around the world, and a listing of these latter companies will be furnished if the Court so requires.

B. Mobil Oil Caribe, Inc.

One hundred percent (100%) of the stock is owned by Shell Overseas Trading Limited (SOTL). The Shell Petroleum Company Limited (SPCO) owns 100% of the stock of SOTL. Sixty percent (60%) of the outstanding shares of SPCO is owned by Royal Dutch Petroleum Company. The remaining 40% is owned by The Shell Transport and Trading Company. SPCO is in turn a shareholder or joint venturer with hundreds of operating and service companies around the world, and a listing of these latter companies will be furnished if the Court so requires.

C. Phillips Puerto Rico Core, Inc.

Phillips Puerto Rico Core, Inc. is a wholly owned subsidiary of Phillips Petroleum Company. The following companies are also wholly owned subsidiaries of Phillips Petroleum Company: Phillips Extruded Products — Les Produits Extrudes Phillips; Phillips Petroleum Chemicals; Phillips Petroleum Tanker Management, Limited; and Phillips Petroleum International S.P.A.

The following companies are direct and indirect subsidiaries and affiliates owned less than 100% by Phillips Petroleum Company: Phillips Carbon Black Limited; Phillips Petroleum Singapore Chemicals (Private) Limited; Phillips Petroleum Interna-

tional Andina, S.A.; Aleska Pipeline Service Company; Arctic LNG Transportation Company; Bissendorf Biosciences GmbH; Canada Western Cordage Company, Limited; Canyon Reef Carriers, Inc.; Chisholm Pipeline Company; Cochin Refineries Limited; Colonial Pipeline Company; Dixie Pipeline Company; East Texas Salt Water Disposal Company; Explorer Pipeline Company; Great Yarmouth Port Labour Company Limited; Heat Transfer Research, Inc.; Iranian Marine International Oil Company — Iminoco; Kenai LNG Corporation; Long Beach Oil Development Company; Multinational Gas and Petrochemical Services Limited; Norland GmbH Fur Grundbesitz Und Industrieanlagen; Norpipe A.S.; Norpipe Petroleum UK Limited; Norsea Gas A/S; Norsea Gas GmbH; Norsea Pipeline Limited; Oil Insurance Limited (New); Papago Chemicals, Inc.; Phillips Petroleum Toray Inc.; Phillips-Imperial Petroleum Limited; Polar LNG Shipping Corporation; Renolit — Haus GmbH; Solar Gas, Inc.; Spodco Limited; The Salk Institute Biotechnology/ Industrial Associates Inc.; Venezoil, C.A.; Walton Insurance Limited; Western Desert Operating Petroleum Company (Wepco); and White River Shale Oil Corporation.

D. Texaco Puerto Rico, Inc.

Texaco Puerto Rico, Inc. is a wholly owned subsidiary of Texaco Overseas Holding, Inc. (a wholly owned subsidiary of Texaco, Inc.) and has no subsidiaries or affiliates.

E. Cía. Petrolera Caribe, Inc.

Cía. Petrolera Caribe, Inc. has no parent company, subsidiaries or affiliates.

F. Isla Petroleum Corp. and Gasolinas de Puerto Rico Corp.

Isla Petroleum Corp. and Gasolinas de Puerto Rico Corp. are wholly owned subsidiaries of U.S.A. Petroleum Corp. U.S.A. Petroleum Corp. has the following affiliates: U.S.A. Petroleum (Bermuda) Ltd.; U.S.A. International Ltd. (United Kingdom); U.S.A. Internacional, S.A. (España); and Texas Oil Corp.

NO. 86-1406

IN THE

Supreme Court of the United States

October Term, 1986

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, et al.,

Petitioners,

v.

ISLA PETROLEUM CORPORATION, et al.,

Respondents.

ON PETITION FOR CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

According to the petition, the regulatory orders at issue herein were enacted because "local gasoline prices were not tracking the downward trend in world oil prices," Pet. 5, and this took place in an island having a "small size, remote location, lack of natural resources,... most of [whose] staple commodities must be im-

ported..." and where "there is no real competition ... in the gasoline industry...," Pet. 4 and 26, in short, allegedly "unique market conditions." Pet. 10 and 26.[1]

The regulatory orders are characterized by petitioners as an exercise of "historic" or "traditional" police power.

Although before the First Circuit petitioners have mounted a full-scale attack on just about every finding made by the trial court (and they acknowledge herein that "there were disputed issues of fact"), they claim that "the only fact necessary to resolve the purely legal question here" is "that DACO, acting under authority of Puerto Rico law, issued orders ... that regulated local gasoline prices...." Pet. 5-6 n. 9.

The situation is not that simple. The salient facts, as found by the trial court and undisputed by petitioners before the Temporary Emergency Court of Appeals ("T.E.C.A."), are as follows:

Petitioners were unable to prove at trial that local gasoline prices had not declined as expected, Petitioners' Supplemental Appendix (hereinafter "Pet. SA") 19-20, or that respondents reaped excessive profits. Pet. SA-25 n. 9, 36, 43 n. 17, 49 and 49 n. 20. To the contrary, the trial court found reductions of wholesale gasoline prices by various respondents as a result of decreases in crude oil prices. Pet. SA-38, 43. The trial court also found the market conditions during the first three months of 1986 to be "abnormal." Pet. SA-43. As to respondents' conduct, "[n]othing extraordinary occurred during January-March 1986." Pet. SA-25 n. 9. Petitioners' evidence was just "soft data," Pet. SA-31, and not "hard evidence." Pet. SA-36.

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[1]Notwithstanding the allegedly "unique" geographic and market conditions of Puerto Rico, Congress expressly included it within the meaning of "United States" and "State" in the pertinent legislation. 15 U.S.C. § 753(7) and 42 U.S.C. § 6202(4). Petitioners never challenged this congressional determination before the courts below nor do they challenge it here. This is not surprising, since that decision by Congress need only have been "rational." *Califano v. Torres*, 435 U.S. 1 (1978); *Harris v. Rosario*, 446 U.S. 651 (1980). Therefore, for purposes of preemption analysis, Congress has decided there was nothing "unique" concerning Puerto Rico.

The trial court found the market in Puerto Rico to be "fiercely competitive," Pet. SA-27 n. 10, and "highly competitive." Pet. SA-37, 50.

The regulatory orders at issue "had no legitimate regulatory purpose," Pet. SA-33, and the administrative "hearings had no meaningful purpose of regulating gross profit margins in the wholesale/retail of gasoline." *Id*. The orders "were not related to a legitimate purpose of regulating gross margins of profit... [but] obeyed to a promise by the Executive Branch of government to maintain the price of gasoline down irrespective of consequences." Pet. SA-66. They lacked "minimum rationality," were arbitrary and had a "politically-motivated purpose." *Id*.

Petitioners omit a crucial finding by the trial court: that in the context of post-September 30, 1981 state action and other than for energy emergency situations, its "research has revealed that no state has enacted price controls, laws or regulations." Pet. SA-77.

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

Due to the peculiar factual, procedural and historical circumstances present in this case, it does not warrant review by this Court. Taken in the abstract, the questions posed by petitioners may appear to be interesting or important, but in the particular context of this case these abstract questions do not present issues of national importance. No compelling issues of federalism are present herein and Puerto Rico is entitled to no special treatment.

The main thrust of the petition is that the majority decision below was wrong and the dissent was correct. A reasoned comparison of the opinion below with pages 8-24 of the petition shows that petitioners' characterization of the decision below is quite unfair. The decision is correct. T.E.C.A. did not depart from traditional preemption principles. Suffice it to add that what T.E.C.A. did was to follow this Court's precedents, and nothing more than what this Court recently did unanimously in *I.C.C. v. Texas*, 479 U.S. __, 93 L.Ed.2d 809 (1987).

II. ARGUMENT

A. Due To The Peculiar Circumstances Of This Case, The Questions Presented Are Not Likely To Recur, Are Merely Abstract And Not Of National Importance.

Procedurally, petitioners are bound herein by the facts found by the trial court, since petitioners did not challenge said findings before T.E.C.A. The regulatory orders at issue arose during a brief three-month period when market conditions were found to be abnormal, although the trial court found that there was nothing extraordinary in respondents' conduct during the first quarter of 1986.

Thus, it can be reasonably surmised that the peculiar market conditions present in this case are not present nationwide and are not likely to be duplicated in any particular state, or even in Puerto Rico itself. For several years prior to the spring of 1986, the public policy of Puerto Rico was, at most, one of merely "monitoring" the market, Pet. SA-34, and respondents were operating under a *de facto* deregulated free competition market. Pet. SA-25 n. 9. Effective almost a year ago, May 20, 1986, Puerto Rico's stated policy is of "returning, as quickly as possible, to primary reliance on competitive market forces to regulate gasoline markets in Puerto Rico." Pet. App. 57a. Thus, the regulatory nightmare at issue herein is limited to a brief three-month period in Puerto Rico. It follows that one should not reasonably expect similar regulations to arise from any of the fifty states of the Union. According to petitioners' August 15, 1986 reply brief before T.E.C.A., page 2, "the conclusion must be that the individual states have not found price or margin controls necessary or desirable in their own circumstances."[2] Respondents can just as easily speculate that the states by their inaction admit that they "are not authorized to be an obstacle to the free market; in this sense, they are preempted from acting." Pet. SA-76. Be

[2]Appendix (hereinafter "Opp. App.") A to this opposition, page A-1. This stands in contrast with petitioners' assertion that this is "an industry in which state governments have *always* had a keen interest." Pet. 25 (emphasized).

that as it may, the trial court stated, "[o]ur research has revealed that no state has enacted price controls, laws or regulations." Pet. SA-77.

Therefore, the questions presented in this case, although they may appear to be interesting, are not of national importance *at this time*. For the fifty states which "have not found price or margin controls necessary or desirable in their own circumstances," or who by their inaction admit that they are preempted from acting, said questions remain abstract. As matters of national importance, the time to review them is not now but only when, if ever, a considerable number of states (and not Puerto Rico fugaciously and in isolation) decide to enter this area of regulation. Until that time comes, if it ever does, the resources of this Court should be devoted to matters of *immediate* national importance.

B. No Compelling Issues Of Federalism Are Involved Herein Because There Was No Bona Fide Regulation.

Certainly, it is a serious matter when a federal court holds that a state's otherwise *legitimate* exercise of police power is preempted and must therefore yield to national policy. But this case is different. As found by the trial court, the regulatory orders at issue herein

> ...did not consider the equities of all sectors concerned. They were not related to a legitimate purpose of regulating gross margins of profit. The orders obeyed to a promise by the Executive branch of government to maintain the price of gasoline down irrespective of consequences. We do not have a record of hearings by DACO with conclusions directing the Agency that the regulations under attack were constitutionally-acceptable alternatives, no matter how bizarre. There is no minimum rationality to these orders and there is ample evidence to sustain their arbitrariness and politically-motivated purpose.

Pet. SA-66. There was no factual support for the regulatory orders at issue and, to the contrary, they were found to have no valid regulatory purpose.[3]

How the "presumption in favor of ... coexistence" between state and federal laws is to operate within "the recent trend to terminate regulation of many industries at the national level," when "many cases ... are likely to arise regarding the proper role of the states in the wake of such deregulation," Pet. 24-25, appears to be an interesting question. However, within the particular context of this case, it is merely an abstract question which can await resolution until another day: in a case where the exercise of state power is otherwise *valid*. This abstract question should not be resolved in the context of unsupported regulatory orders which had no *legitimate* regulatory purpose to begin with.

C. There Is No Special Deference Due To Puerto Rico.

Petitioners seem to claim that Puerto Rico's political status entitles it to a special rule of deference by this Court. This is not the law[4] and constitutes an unwarranted invitation to this Court to enter a political thicket.[5] Further expounding on settled law and (much less) venturing into political questions are not sufficient reasons for this Court to exercise its discretionary power of review.

In the final analysis, what petitioners seek is to upset national policy decisions which evolved from complete regulation to partial deregulation to no regulation. The results of those national policy decisions have served the Nation well. Whatever special

[3]Notwithstanding the illegitimacy of the exercise of regulatory power by petitioners herein, it should be noted that the trial court found no specific Puerto Rico statute unconstitutional, contrary to what petitioners assert. Pet. 10. To the contrary, the trial court left various areas of regulation unfettered to petitioners. Pet. SA-85-86, 94.

[4]*First Circuit Judicial Conference*, 110 F.R.D. 449 (1985). See also note 1 at page 1 above.

[5]Torruella, Juan R., *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal* (University of Puerto Rico Press 1985).

deference may be due Puerto Rico, it cannot go as far as frustrating the weal of the Nation as a whole.

D. The Decision Below Is Correct.

1. T.E.C.A.'s Decision Is Consistent With Traditional Preemption Principles.

Petitioners' argument that T.E.C.A. departed from well-established preemption principles is mistaken. T.E.C.A. strictly adhered to those principles by painstakingly searching for congressional intent as expressed in the legislative history of the relevant statutes. Citing recent decisions of this Court, T.E.C.A. prefaced its discussion of the preemption issue as follows: "the primary task in deciding a preemption issue is to determine congressional intent. *Wardair Canada, Inc. v. Florida Department of Revenue*, 54 U.S.L.W. 4687, 4688 (U.S. June 18, 1986); *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 54 U.S.L.W. 4505, 4509 (U.S. May 27, 1986)." Pet. App. 6a.

As is clear from the same cases cited by petitioners, the standard applied by T.E.C.A. is neither new nor has it been set aside or modified by recent decisions of this Court, including *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board*, 474 U.S. __, 106 S.Ct. 709, 88 L.Ed.2d 732 (1986). That congressional purpose is the "ultimate touchstone" of preemption has long been established precedent. *See Retail Clerks v. Schemerhorn*, 375 U.S. 96, 103 (1963), *cited in Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. __, 89 L.Ed.2d 223, 230 (1986). To this day, it remains the applicable standard. *See, e.g., R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. __, 107 S.Ct. 499, 93 L.Ed.2d 449, 461 (1986); *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. __, 107 S.Ct. 683, 93 L.Ed.2d 613, 623 (1987).

In this case, T.E.C.A. did no more or no less than determine Congress' intent in enacting the Energy Policy and Conservation Act ("EPCA"), P.L. 94-163, 89 Stat. 871 (1975) (codified at 42 U.S.C. § 6201), providing for the gradual expiration of federal regulatory authority. T.E.C.A. found that under the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. §§ 751 *et*

seq., and its amendments, federal regulation of the Nation's energy resources was pervasive. However, upon its careful review of the legislative history of EPCA, T.E.C.A. recognized that 1975 ushered a pivotal change in the national energy policy.[6] Congress decided to terminate price controls by September 1981. EPCA amended EPAA to provide for a gradual decontrol until complete elimination of regulatory authority. The congressional purpose was to assure "a smooth transition of petroleum markets from a closely regulated state to a large[ly] unregulated status subject to standby pricing and allocation authority." S. Conf. Rep. No. 94-516, 94th Cong., 1st Sess. 204, *reprinted in* 1975 *U.S. Code Cong. & Ad. News* at 2045. *See also* H.R. Rep. No. 94-340, 94th Cong., 1st Sess., *reprinted in* 1975 *U.S. Code Cong. & Ad News* at 1817-1818.

As the above discussion demonstrates, "[t]he legislative history repeatedly confirms Congress' view that exemption from EPAA regulation represents an *affirmative federal decision* that petroleum product prices be set by the free market." *Mobil Oil Corp. v. Dubno*, 492 F. Supp. 1004, 1012 (D. Conn. 1980) (emphasized), *aff'd in part, dismissed in part*, 639 F.2d 919 (2nd Cir. 1981). "Congress clearly expressed its preference, moreover, that a petroleum product, once returned to the free market, should remain free of price controls indefinitely." *Id*.

Pivotal to the preemption analysis are Congress' reasons in providing for decontrol. In 1975, Congress recognized that "[t]he fundamental reality is that this nation has entered into a *new era* in which energy resources previously abundant [will] remain in short supply, retarding the [nation's] economic growth and necessitating an alteration in [the nation's] life habits and expectations," thus establishing *"the need for policy decisions at the national level."* H.R. Rep. No. 94-340, 94th Cong., 1st Sess., *reprinted in* 1975 *U.S. Code Cong. & Ad. News* at 1763 (emphasized). Therefore, "[t]he recognition on the part of Congress that the United States was entering a new era...which necessitated a national energy policy belies [the] argument that the 1975 amendments to the EPAA signaled a return to the *status quo ante*, allowing states to regulate freely with regard to petroleum products." *Mobil Oil Corp. v. Tully*, 499 F. Supp. 888, 909 (N.D.N.Y. 1980), *aff'd*, 653 F.2d 497 (T.E.C.A. 1981), *vacated and remanded*, 455 U.S. 245 (1982). T.E.C.A. understood as much in this case:

> The EPCA's gradual decontrol evidences a carefully controlled transition to an unregulated market. Throughout the transition the federal scheme continued to pre-empt state regulation in the area, even with respect to exempted products. *Mobil Oil Corp. v. Tully*, 653 F.2d at 502; *Mobil Oil Corp. v. Dubno*, 492 F. Supp. at 1014; *see also Tully v. Mobil Oil Corp.*, 455 U.S. at 250-51 (Stevens, J., dissenting). It is inconceivable that Congress would implement such an extensive and carefully orchestrated termination of federal intervention with the intention that the states step in to regulate the same subject matter as soon as all federal intervention ceased. A single state's regulation of petroleum products may not have a substantial effect on national markets. However, the possibility of over 50 individual regulatory schemes operating in the petroleum products markets clearly conflicts with and frustrates Congress' goal of allowing market forces to regulate the supply and price of petroleum products.

Pet. App. 13a-14a.

Post-1981 legislative history and enactments, as T.E.C.A. correctly found, "strengthen [the] conclusion that Congress intended to rely on market forces to determine the allocation and prices of petroleum products." Pet. App. 14a-15a. The legislative debate

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[6]Petitioners, unlike T.E.C.A., have chosen to ignore the legislative history of the EPCA. Said legislative history reveals that Congress and the Executive compromised over the gradual decontrol and termination provisions so as to achieve a mutually acceptable transition to a market free from regulation. It is petitioners who depart from traditional preemption principles by ignoring legislative history which reveals congressional intent adverse to their position.

regarding the Standby Petroleum Allocation Act ("SPAA"), S. 1503, § 280(a), 97th Cong., 2d Sess., 128 Cong. Rec. H411 (daily ed. Feb. 22, 1982), shows that "both supporters and opponents of the SPAA placed great reliance on market forces as the best means of avoiding supply disruptions." Pet. App. 15a. Supporters of the SPAA strove to differentiate this act from "the regulatory nightmare we did see under the EPAA...." 128 Cong. Rec. S2722 (daily ed. March 24, 1982). Thus, the regulatory authority which the SPAA granted the President was intended to be used only in cases of "severe petroleum supply shortage." S. 1503, § 275(a)(1), 97th Cong., 2d Sess., 128 Cong. Rec. H410 (daily ed. Feb. 22, 1982). As T.E.C.A. recognized, "[o]therwise, market forces would determine the allocation and prices of petroleum products." Pet. App. 15a. Despite the limited scope of the SPAA, the President vetoed the bill, stating:

> What I do not have, do not want and do not need is a general power to reimpose on all Americans another web of price controls and mandatory allocations.
>
> ...
>
> Controls can only shift losses (due to supply disruptions) from one set of Americans to others, with vast dislocation and loss of efficiency along the way. This was very amply demonstrated during the supply interruptions of 1973-74 and 1978-79. Those interruptions precipitated much higher oil prices, but they did not cause gas lines and shortages. *It took government to do that.*

128 Cong. Rec. 2514 (1982) (emphasized).

As T.E.C.A. well stated, "[t]he fact that the Senate sustained President Reagan's veto is further evidence of a strong national policy to rely on market forces, even in the case of an emergency." Pet. App. 15a-16a.

Furthermore, in 1982 Congress enacted the Energy Emergency Preparedness Act ("EEPA"), 42 U.S.C. §§ 6281 *et seq.*, in

response to fears that "a shortage of petroleum products may occur at any time [and that] such a shortage may be sufficiently large to cause severe economic dislocations and hardships, or constitute a serious threat to health, safety and welfare." S. Rep. No. 393, 97th Cong., 2d Sess. 19, *reprinted in* 1982 *U.S. Code Cong. & Ad. News* at 615. This statute contains an explicit reiteration of the national policy concerning petroleum products:[7]

> Sec. 6281. Congressional findings, policy, and purpose
>
> (b) Policy
>
> The Congress declares that it shall be the policy of the United States that the Federal Government shall be prepared prior to any shortage of petroleum products to respond to energy emergencies, pursuant to authorities under provisions of law other than this part, *as a supplement to reliance on the free market* to mitigate the adverse impacts of a shortage of petroleum products on public health, safety, and welfare.

42 U.S.C. § 6281(b) (emphasized).

As T.E.C.A. correctly found: "Congress did not by enactment

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[7]The declaration of policy is preceded by specific findings:

> (a) Findings
>
> The Congress finds that —
>
> (1) a shortage of petroleum products caused by reductions in imports of petroleum products may occur at any time;
>
> (2) such a shortage may be sufficiently large to cause severe economic dislocations and hardships, or constitute a serious threat to public health, safety, and welfare; and
>
> (3) prior to the occurrence of such a shortage, the Federal Government has a responsibility to be prepared to mitigate the adverse impacts of such a shortage *as a supplement to reliance on free market pricing and allocation of available petroleum product supplies.*

42 U.S.C. § 6281(a) (emphasized). The recognition by Congress that a shortage of petroleum products may occur at any time belies petitioners' claim that in 1981 Congress meant to return to the *status quo* prior to 1973.

of the EEPA alter the free market policy it had expressed in the EPCA. Rather, it *reiterated* that policy." Pet. App. 16a (emphasized).

The free market policy is equally strong today. In presenting to Congress the 1985 National Energy Policy Plan,[8] pursuant to Section 801 of the Department of Energy Organization Act, 42 U.S.C. § 7321, President Reagan emphasized the importance to the national energy policy of allowing "the marketplace, rather than government, to make key economic decisions about energy." Opp. App. A-4. The Plan recognized that the "Nation learned lessons about energy in the 1970's that it must never forget." Opp. App. A-22. It seems clear that "[t]he dismantling of price and allocation controls, and our determination to resist them in the future," have been the cornerstone for the Nation's energy policy in the 1980's. Opp. App. A-13. Such reliance on free markets contributes to the Nation's energy security. Naturally, state-imposed price controls interfere with free petroleum markets — and thus jeopardize our energy security — as effectively as federally imposed controls. Thus, T.E.C.A. was correct in its conclusion that "...Congress' initial intent to deregulate the petroleum products market remain[s] in place..." and that "Congress intended to establish markets free of *any* government interference." Pet. App. 17a (emphasized).

2. T.E.C.A.'s Decision Is Consistent With This Court's Precedents.

Having determined that Congress' intent was "to establish a market free of *any* government control other than standby emergency controls," Pet. App. 14a (emphasis in original), T.E.C.A. simply followed this Court's dictate in *Transcontinental*. In that case, this Court considered the preemptive effect of Congress' decision to deregulate the natural gas market. After scrutinizing the legislative intent of the relevant statutes, this

[8]President Reagan's letter transmitting the Plan to Congress and the Plan's "Introduction and Executive Summary" are appended hereto as Appendix B to this opposition.

Court reiterated that "'[a] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much preemptive force as a decision *to* regulate.'" 106 S.Ct. at 717, 88 L.Ed.2d at 744 (*quoting from Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 384 (1983)) (emphasis in original).

This Court concluded in *Transcontinental* that the removal of authority from the Federal Energy Regulatory Commission ("FERC") to regulate a component of the gas industry was part of a federal scheme to rely on market forces to determine the supply and price of natural gas: "Congress denied FERC the power to regulate affirmatively...because it wanted to leave determination of supply and first-sale price to the market." *Id.* Thus, the congressional decision to rely on market forces was held preemptive of state regulation which conflicted with market forces: "In light of Congress' intent to move toward a less-regulated national natural gas market, its decision to remove jurisdiction from FERC *cannot* be interpreted as an invitation to the states to impose additional regulations." *Id.* (emphasized).

Against this backdrop, it is clear that T.E.C.A. correctly adhered to this Court's mandate as expressed in *Transcontinental*. The issue here, just as in that case, was whether Congress, in deciding to terminate federal regulatory authority in order to achieve a deregulated petroleum market, "intended to give the States the power it had denied" the President, or whether it intended instead to "leave determination of supply and price to the market." In view of the previously discussed legislative intent of the EPCA, as subsequently confirmed by the EEPA, the answer to that inquiry in this case is as clear as in *Transcontinental*. That answer is precisely the one given by T.E.C.A.: the regulations and orders at issue herein are preempted by Congress' conscious and affirmative decision to forgo regulation of petroleum prices and profit margins so as to allow the interplay of market forces to set said prices and margins.

Petitioners have placed almost complete reliance on this Court's decision in *Tully v. Mobil Oil Corp.*, 455 U.S. 245

(1982). *Tully* is no bar to T.E.C.A.'s decision, nor does it present any conflict with this Court's *Transcontinental* decision. As T.E.C.A. recognized, this Court faced *Tully* in a different context than that faced by T.E.C.A. in this case. To begin with, all this Court did in *Tully* was to summarily resolve that "the judgment and injunction are not appropriately framed for this Court to review." 455 U.S. at 248. This Court remanded the case to T.E.C.A. "for reconsideration in light of the expiration of federal price control authority under the EPAA." The *Tully* decision did mention "the date T.E.C.A. acknowledged to signal the end of federal concern in this area" as having come and gone, but this Court did not have before it then anything other than T.E.C.A.'s *dicta*. Pet. App. 15a n. 8. The parties did not brief the effect of the expiration of presidential authority to control prices before T.E.C.A., nor did they brief it before this Court.[9]

T.E.C.A. warned in its opinion that it had not done a complete preemption analysis in deciding the appeal:

[9]Petitioners acknowledge that the impact of national policy on post-1981 preemption was not briefed by the parties before this Court. Pet. 15. They would have this Court draw an inference from the fact that the parties did not address this matter after the Clerk of this Court requested their views on whether expiration of the federal regulatory program mooted the case. Concededly, the parties addressed the issue of mootness. They did not then address the issue of preemption. Upon remand to T.E.C.A., they expressed their views that the federal interest in unregulated petroleum product prices continued beyond October 1, 1981. Memorandum for Plaintiffs-Appellees at 9, *Mobil Oil Corp. v. Tully*, 689 F.2d 186 (T.E.C.A. 1982) (Nos. 2-29, 2-30). They stated, however, that the issue had not been presented by the state's appeal to the Supreme Court nor was it then before T.E.C.A. *Id.* at 12. They nonetheless expressed their intention to raise said issue at a later date before the district court. And so they did, upon remand of the case by T.E.C.A. In fact, the oil companies moved for summary judgment on the grounds that "[t]here is still an affirmative federal energy policy of decontrol of petroleum product pricing...." Memorandum for Plaintiffs at 13-14, *Mobil Oil Corp. v. Tully*, No. 80-CV-543 (N.D.N.Y.). The case was settled, however, before the district court disposed of the pending issues. Petitioners' invitation to draw inferences which later events clearly contradict is unwarranted.

> Judge McCurn found it unnecessary to decide whether Congress had intended that there be exclusive federal control over allocations and pricing of petroleum products, resting his decision on the "conflict" standard for preemption. We, too, do not reach the "occupation of the field" question; we find sufficient basis under the conflict standard to exclude the State from exercising the anti-passthrough provision.

Mobil Oil Corp. v. Tully, 653 F.2d 497, 499 (T.E.C.A. 1981).

Moreover, neither T.E.C.A. nor this Court had in *Tully* the benefit of post-1981 legislative and executive actions shedding light on congressional intent and the national policy in this field. In this case, on the contrary, T.E.C.A. not only did the comprehensive analysis which in *Tully* it acknowledged it had not done, but also had the benefit of post-1981 events and of this Court's *Transcontinental* decision to guide it in said analysis. T.E.C.A. acknowledged as much. Pet. App. 11a.

As recently as last January, this Court unanimously reaffirmed that a congressional decision to allow free competition in a particular industry constitutes an authoritative determination that the industry is best left unregulated, despite a claim of partial State regulation. *I.C.C. v. Texas*, 479 U.S. __, 93 L.Ed.2d 809 (1987). This Court looked to the statement of rail transportation policy in § 10101a of the Staggers Rail Act, 49 U.S.C. § 10101a, and found that "Congress unambiguously expressed its interest in allowing free competition, to the maximum extent possible, to govern the financial health of the railroad industry." 93 L.Ed.2d at 818. Thus, in the *I.C.C. v. Texas* case, as in this one, Congress had learned that excessive regulation of an industry was responsible for creating inefficiencies and distortions contributing to the financial difficulties of the industry and prejudicing the welfare of the Nation. This Court deferred to the congressional determination that the particular industry is best left unregulated.

The same was done by T.E.C.A. in this case and no review of its decision is warranted.

III. CONCLUSION

For the foregoing reasons, appearing respondents very respectfully pray that the petition for certiorari be denied.

Igor Domínguez
WILLIAM ESTRELLA
LAW OFFICES
Counsel for Texaco
Puerto Rico, Inc.
P.O. Box S-4826
San Juan, Puerto Rico 00905
(809) 721-7481

Rafael Pérez-Bachs*
Néstor M. Méndez-Gómez
Maggie Correa-Avilés
Ana Matilde Nin
Arturo J. García-Solá
McCONNELL VALDES KELLEY
SIFRE GRIGGS & RUIZ-SURIA
Counsel for The Shell Company
(Puerto Rico) Limited,
Mobil Oil Caribe, Inc., and
Phillips Puerto Rico Core, Inc.
G.P.O. Box 4225
San Juan, Puerto Rico 00936
(809) 759-9270

Alvaro R. Calderón, Jr.
Counsel for Isla Petroleum
Corp. and Gasolinas de
Puerto Rico Corp.
P.O. Box 2219
Hato Rey, Puerto Rico 00919
(809) 753-5050

Carlos F. López
Celso E. López
Counsel for Cía. Petrolera
Caribe, Inc.
P.O. Box 8852
Santurce, Puerto Rico 00910
(809) 721-5037

*Counsel of Record

Dated: April 10, 1987
San Juan, Puerto Rico

APPENDIX

APPENDIX A

Appellees significantly detracts from Appellants' showing that there is no preemption of Puerto Rico's gasoline regulations.

Appellees try to raise the ante with the dire warning that unless Puerto Rico's regulations are invalidated, numerous other states will be tempted to institute petroleum price controls.[3] Interestingly, the district court found that no other state has "enacted price controls, laws or regulations." June 4 Order at 88. Moreover, since the Emergency Petroleum Allocation Act ("EPAA") expired, there is no evidence to suggest that any state believes it is under any legal inhibition to enact price control statutes or regulations. Thus, the conclusion must be that the individual states have not found price or margin controls necessary or desirable in their own circumstances. In Puerto Rico, however, price controls have traditionally been utilized with respect to a number of essential commodities.[4] This is because of Puerto Rico's remote location, its heavy dependence upon imports and the relative lack of competition within this small island. Appellees prefer to ignore the fact that this is a decision Puerto Rico is entitled to make for itself pursuant to its inherent police powers. *See Cordova & Simonpietri Insurance Agency v. Chase Manhattan Bank, N.A.*, 649 F.2d 36, 42 (1st Cir. 1981).

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[3]Appellees Br. at 25.

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[4]Indeed, Puerto Rico exercised its inherent police powers to regulate gasoline prices from 1953 up until 1973, when the EPAA was enacted. *See* Appellants Br., Appendix D.

APPENDIX B

THE NATIONAL ENERGY POLICY PLAN

A Report to the Congress
Required by Title VIII of the
Department of Energy Organization Act
(Public Law 95-91)

UNITED STATES DEPARTMENT OF ENERGY
Washington, D.C. 20585

1985

TO THE CONGRESS OF THE UNITED STATES:

I am pleased to report to you that the state of our energy health is good, and the prospects for its future promising.

Our energy climate has undergone a remarkable transformation in just five years. Crude oil prices have declined, with savings passed on to consumers. The United States is using energy more productively, and our energy supply is more diversified than ever. Total U.S. energy production is at an unprecedented level, and we are far less vulnerable to disruption of our energy supplies.

Our renewed energy health is a testament to the ingenuity of the American people and the strength of American businesses, large and small. We have rightly placed our trust in our people and the belief that we were not running out of energy, only imagination. We have reduced regulation, wherever and whenever possible. We have placed our confidence in the marketplace, rather than government, to make key economic decisions about energy.

The result is a foundation of energy stability and energy security. We stand at the beginning of a new era of energy strength in which the United States has the resources and capabilities to sustain vigorous economic growth, as well as our important role in the free world.

With this new opportunity, of course, come new challenges. Unless these challenges are met, we may not achieve the energy exploration, technological advance, and conservation improvements this Nation needs. We have more work to do in cutting regulatory barriers, especially natural gas controls, diversifying our resources, and increasing alternate energy sources, which should further reduce our dependence on insecure energy imports. I am submitting the Fifth National Energy Policy Plan, which addresses the job ahead.

We are fortunate we can look forward to the coming era with confidence that we have learned from the lessons of the past and that with new tools and justified belief in the American people, our technology, and free markets, we will meet the energy challenges and opportunities ahead.

s/ Ronald Reagan

THE WHITE HOUSE,

[1]

I. THE COURSE AHEAD

An Introduction and Executive Summary

A dozen years ago, a much-publicized oil embargo triggered a series of jolts to the U.S. economy and life patterns. Crude oil supply shortages, long lines at gasoline stations, inflationary pressures, and a disquieting aura of subjection to a foreign cartel were epitomized in the term "Energy Crisis," but the hurt and the threat extended far beyond the fairly narrow sector of our society traditionally designated as "energy." Everyone and everything seemed doomed to be unsettled indefinitely by these new developments.

Our Nation's problems were exacerbated at first by successive policies that tried to dictate in detail the type of energy Americans would produce and how they would be permitted to consume it. The failure of these policies encouraged runaway price rises for energy and for every product or service that embodied energy. Continuing high levels of oil imports were based on an unwarranted perception of national helplessness rather than on thoughtful economic judgment.

Rationing and rigid controls of various types were soon discredited widely, yet no alternative crystallized. The objectives most people sensed to be important — improved domestic production, sound conservation of the scarcest energy resources, diversification of our national energy base, and reasonable prices throughout — were bound to elude this country if the only incentive to them was government exhortation. They did.

The Administration that took office in 1981 turned U.S. national energy policy around; and it has held to the same basic heading since then. Resistance to this course has slowed progress in a few respects, and some adjustments (such as those described in this document) can be helpful.

Just a few days after being sworn in, the President decontrolled U.S. oil markets. Since then, the Nation has committed itself increasingly to rely on the resourcefulness and ingenuity of the American people in response to market forces. Heavyhanded

government planning has been abandoned. The results that have flowed from these changes have been impressive. The American people are being served well.

The United States must be able to explore for, locate, develop, and use new energy sources and conservation technologies. The record shows that this is done best in a climate of reduced government regulation, fewer controls, lower tax rates within a fair tax system, and a commitment to the principles of free international trade in energy. Unwarranted government intervention creates rigidities that prevent or discourage market forces from adjusting to change. Appropriate economic responses are blocked. Technological breakthroughs become far less likely.

The log of recent years in energy *policy* planning (as distinguished from the earlier efforts at micromanaged *energy planning*) is replete with success stories. Crisis management has been superseded by stability. National energy security has improved. Americans have moved a long way toward an energy system in which efficiency freely develops strength.

Considering a broad range of factors (including environmental quality, domestic availability, and cost — as well as the time it takes for new technology to suffuse and transform enormous residential, commercial, industrial, and transport markets), it makes the most sense at this time for the energy sector of the U.S. economy to emphasize coal, nuclear energy, and conservation wherever they are economical. Electricity, though not a source of primary energy itself, has been an important delivery mechanism through which to apply this "triad." It will continue to be so.

Nevertheless, an economically efficient, flexible energy system continues to steer the Nation away from an overdependence on even this important handful of energy resources. Petroleum, natural gas, and renewable sources (ranging from "old" hydro to "new" solar) are all part of the balanced energy mix that is appropriate to support economic growth and to permit producers and consumers to choose freely among all practical and competitive energy options. But it will be the marketplace, rather than the Government, that actually makes the decisions about development pace for each one.

Consider how well this approach has been working over the past 5 years:

- Crude oil prices have declined; and the savings have been passed on to consumers in the form of retail prices for heating oil, gasoline, and other petroleum products that are markedly lower than they were at the beginning of 1981.
- The United States is using energy more productively during the 1980's than ever before in its entire history.
- Total U.S. energy production has reached an unprecedented high level.
- The worldwide oil cartel is under increasing pressure.

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- This country is far less vulnerable today to damage from any potential disruption of fuel supplies than it was just 5 years ago — thanks to generally lower levels of oil imports, greater diversity of our supply sources, and the conversion of the Strategic Petroleum Reserve (SPR) from a mere "good intention" to the status of an effective insurance policy for the Nation.
- With all that, our air is cleaner and the quality of our waters has improved.

At the same time, we should recognize that our energy situation is not perfect. Some nonessential regulations still discourage economical energy production and use. The Nation still spends more than $40 billion a year on net energy imports. It remains part of a world energy system in which our own prices and supplies are affected inevitably by problems and successes around the globe. And the principal domestic fossil energy sources this country is tapping must eventually diminish. Until potential suppliers can reduce the capital-intensive costs of some widely available renewable sources (for example, solar energy) and the high gathering or processing costs of other sources (for example, biomass, shale oil, and synthetics), Americans must focus their consumption on what is at hand. This means that for many years to come the United States will need more oil, gas, and coal from its domestic resource sites, including Federal lands and the federally managed Outer Continental Shelf (OCS). Our people should

be able to count on nuclear power. All sectors of the economy must develop even more efficient ways of producing and using energy resources of all kinds.

In this context, let us consider our national energy policy goal and the strategies that are intended to lead America along a pathway to growing stability, security, and strength in regard to energy.

The Reagan Administration's goal in energy policy continues to be that Americans should have an adequate supply of energy, available at a reasonable cost. The basic strategies for holding to this goal are to maximize the practical reliance on the free decisions of the entire populace, while maintaining public health and safety and environmental quality, and to promote a balanced and mixed energy resource system. Specific sections of this document outline how these strategies are being applied at this time to respective energy sources.

As the Nation looks forward to even fuller realization of its firm energy goal, it has become clear that this goal presupposes three broad conceptual objectives: energy stability, energy security, and energy strength. During the past 5 years, the United States of America has achieved energy stability. The Nation has made substantial progress in its continuing effort to achieve energy security. Thanks to the essential energy triad of energy conservation, abundant coal, and reliable nuclear power, our country is steadily developing energy strength.

Energy stability means a situation in which problems of energy availability and price do not destabilize the U.S. economy and our way of life. It means an energy climate that gives Americans confidence and promotes steady economic growth. It includes a consistent regulatory policy, upon which all energy producers and consumers can rely. Though it may seem a paradox, it is the very flexibility of our free-market system and its long-run ability to cope with *changing* circumstances that bring stability.

Energy Security means that adequate supplies of energy at reasonable cost are physically available to U.S. consumers, from both domestic and foreign sources. It means that the Nation is less vulnerable to disruptions in energy supply...and that it is

better prepared to handle them if they should occur. By maintaining and having the resolve to use the Strategic Petroleum Reserve, ensuring an adequate defense capability (to discourage cutoffs in energy supplies), closely coordinating energy emergency policies with our allies, and facilitating the production of U.S. energy resources, great progress have been made in ensuring the availability of adequate supplies at a reasonable cost.

Over the longer haul, energy security leads to *energy strength*. Energy security produces confidence that the current favorable situation can continue for the foreseeable future. The vast energy resource base of the United States has the potential of providing the power for our own continued economic development, as well as for the advancement and defense of the free world. But the promise of this potential will not be achieved without effort.

Secure domestic sources of energy helped mold the foundation of this Nation, and they have not declined in importance. The future of this Nation depends as much on what is done in the coal fields of Kentucky or in the gas fields of Oklahoma as it does upon what is accomplished at the negotiating table in Geneva.

A strong America is inseparable from a secure America. National strength, and the strength of future generations, is rooted as deeply in the full use of all our economic resources — including especially competitive domestic energy resources — as it is in the full protective strength of armed forces.

Energy Stability in Price and Supply

Energy problems currently are not a destabilizing force in the national life and economy. To give just a few examples:

- Since early 1981, market forces have reduced real oil prices on the world market by more than 40 percent.
- Between 1981 and 1985, the cost of a gallon of gasoline or heating oil for Americans declined by about one-third relative to disposable income per capita.
- Total domestic crude oil production has risen annually since 1981, reaching in 1985 the highest level for any year since 1973.

- Nuclear energy has surpassed oil and natural gas (as well as hydroelectric power) to become the second largest source of electricity in the United States. Nuclear powerplants currently provide more than 15 percent of total electric generation, second only to coal.
- Net imports of crude oil and petroleum products for 1985 (less SPR imports) were about 27 percent

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of domestic oil consumption, compared with 37 percent of consumption for all of 1980.
- At the end of 1980, the Strategic Petroleum Reserve held just over 100 million barrels of crude oil, equivalent to only about 17 days' supply of the net imports for that year. But now the SPR holds nearly 500 million barrels of oil, the equivalent of about 120 days of current net imports.

Yet, this good news must not lead to complacency. There are many problems we will face if we do not prepare for them:

- Domestic reserves of oil and gas have been generally falling — more slowly than before, but nonetheless falling.
- Areas of significant potential oil and gas reserves onshore and offshore are being delayed or foreclosed from exploration and development.
- Some indexes of exploration activity and drilling are now lower than at any time in the past 6 to 8 years in the United States.
- No new nuclear powerplants have been ordered in the United States for domestic construction since 1978, and 75 nuclear plants once scheduled for construction have been canceled since then.
- Less than 3 gigawatts of new coal-fired electric capacity have been ordered since 1981.
- The Energy Information Administration projects declines in domestic oil production after 1990 and corollary increases in oil imports.

None of these issues or problems constitutes an unavoidable threat provided we anticipate it and act wisely to counteract it.

The Reagan Administration supports policies that will protect the energy stability that has been achieved. Unless we continue to

build on what has been achieved in recent years, the present favorable results of our immediate past efforts in energy exploration, production, and conservation could deteriorate. For example, while oil and gas reserves have been maintained at high levels, reserves could drop significantly unless opportunities and economic incentives for exploration and development are continued. Market-oriented policies that build upon America's vast production and conservation resources and its technological genius, free of arbitrary regulation, provide the best hope of maintaining the momentum of energy progress of the past 5 years. But the regulatory burden is not yet adequately restructured to permit appropriate economic and energy judgments to be made. To the extent it is able to work, the flexibility provided by a balanced and mixed energy system has proven superior to rigid plans and regulations in securing a stable energy system.

Energy Security in an Uncertain World

Over the past decade or so, energy has ridden a roller coaster of public sentiment — from complacency to crisis and, perhaps, back toward complacency again. This country enjoys stability now, and there are good prospects of future stability. But a commitment to energy security means that the Nation cannot afford to drift. The United States must never again allow itself to become as vulnerable to foreign supply disruptions as it was in the 1970's.

This Administration will continue to work on five major aspects of protection for America's energy security: emergency preparedness, international energy security, research and development, domestic production, and efficiency in energy use.

Emergency Preparedness. An important lesson of the 1970's was that energy security requires preparations for unforeseen energy emergencies. The Reagan Administration has acted upon that lesson by building the Strategic Petroleum Reserve, supporting the diversification of energy technologies and applications, improving relations with allied countries, and dismantling the

U.S. price controls that aggravated past disruptions in world oil markets.

Rapid filling of the SPR over the past 5 years has been one of the most effective actions taken by the United States to enhance energy security. Current market conditions (lower U.S. import levels and large amounts of excess oil production capacity in the world) reduce the potential dangers from oil supply disruptions in the near term. The Administration will continue to review SPR fill rates to be certain that the insurance provided by the reserve is maintained in a cost-effective manner.

Since the end of 1980, the supply of oil in the SPR has more than quadrupled. Thanks to these farsighted efforts, the United States is now much better prepared to cope with potential disturbances in the world oil market. The dismantling of price and allocation controls, and our determination to resist them in the future, coupled with national readiness to use the SPR promptly to supplement oil supplies during any supply-disruption emergency, ensures that the gasoline lines of 1973-74 and 1979 will not return.

International Energy Security. Cooperation with other countries in promoting energy security has been a hallmark of U.S. policy since the 1970's. America's international policy toward energy security reflects its domestic goal of reducing government intervention to allow markets to function more freely.

The United States seeks a stable and secure world energy environment, recognizing the interdependence as well as the independence of other nations. We have played a strong leadership role in the International Energy Agency (IEA), which was established by the Agreement on an International Energy Program of 1975. In recent years, we have reached agreement on a range of measures that enhance our mutual energy security, including undertaking:

- To preserve or create open energy markets (particularly with respect to oil-product imports), to encourage greater energy production of all types, and to foster greater energy trade.

- To guard against increased vulnerability by concentrating on secure sources and by avoiding undue dependence on any one source of energy supply.
- To maintain adequate oil stocks, and to coordinate early drawdowns of stocks and complementary measures among IEA partners in the event of a supply disruption.
- To enhance international collaboration in research and development through early consultations and joint program planning — thus improving economic efficiency and the rate of technology and development.

Research. Appropriate investment in research and development is fundamental to energy security. The Federal Government should not and cannot do the entire job, but it can help. Its energy R&D focuses now on all sources of energy — renewables, conservation, fossil, nuclear, fusion, and alternative fuels — as well as on the effects of energy activity on human health and the environment. It concentrates on a generic role — one that inspires and complements initiatives of the private sector rather than competing against it or skewing national economic incentives through random subsidies.

Research and development in energy technologies advance through several phases: basic research, applied research, proof-of-concept, process development, and finally commercialization. The Administration's policy focuses Federal efforts on the earlier phases of the process. It is willing to undertake precommercial stages of higher risk projects that show potential for large long-term benefits, but which would not be cost-effective for private organizations because of their inability to reap the benefits or because of the projects' high cost, uncertainty, or likely slow payoff. Even here, private-sector participation is encouraged to the maximum practical extent — thus adding leverage to Federal resources. In addition, private financial commitments are a solid test of the true value placed upon a category of research by nongovernment interests and may help determine the level of spending and priority that any particular area justifies.

The decision as to the economic feasibility of the later, more expensive phases of R&D is always left most appropriately with

the marketplace. This approach invites investors in the private sector to select the technologies to push to commercialization — the ones they think will ultimately gain market acceptance. Experience shows that the Federal Government is not as well equipped to make such decisions.

Domestic Production. Energy security, stability, and strength all depend in large measure on the United States' ability to explore for and develop domestic energy resources. This Administration supports the economic development of these resources to the fullest extent practicable, consistent with maintaining high standards of public safety, health, and environmental quality. To that end, the Administration supports policies that will:

- Open up additional offshore oil and gas fields to expeditious exploration and production, in accordance with strict environmental safeguards.
- Eliminate the remaining Federal price controls on domestic natural gas production.
- Provide access to the vast supplies of coal on Federal lands.
- Restore U.S. primacy in uranium enrichment.
- Provide a stable and predictable regulatory environment for the efficient, economical production of energy.

Efficiency in Energy Use. Energy productivity (as measured by the Nation's real economic output per unit of energy consumed) improved about 16 percent between 1980 and 1985 — the greatest improvement in efficiency since World War II. This progress is continuing, despite falling real energy prices and a de-emphasis of government demonstration programs and "mandated conservation." Market forces and private initiative, not government programs, are the best promoters of further improvements in energy efficiency.

Energy Strength: A Balanced and Diversified Mix

What kind of energy future do Americans want? How can we achieve it?

Fundamentally, the Nation deserves a future in which its resources are used effectively to strengthen the economy and secu-

rity of both the United States and the free world. The resources exist to make this a reality: fossil fuels, nuclear energy, solar and other renewables, an efficient electricity supply system, and conservation. But energy strength also derives from the human potential of national laboratories and the tens of thousands of private research facilities across a Nation that is committed to knowledge and skill and general excellence. It comes from the incentives of a free-choice environment, from industrial inventiveness, and from innovative technologies. Decisions are better made on a regional or local basis; what makes sense in the Sun Belt may not always make sense in the Northeast — and vice versa.

Today's energy stability gives us the opportunity to build an expanded base of technical knowledge for resources that we will have to count on in the future. Nonetheless, it would be foolish to suggest that the future of the United States is not still inextricably tied to oil and gas development. These two fuels of convenience are the ones that will remain the marginal sources of supply for the rest of this century and beyond. This is precisely why — by relying on market forces — this Administration has cultivated a diversification of energy resources. This progress will be continued for all elements of a balanced energy mix.

Oil and Gas. For the rest of this century, oil and gas are likely to remain the principal energy sources of the American people. They now provide about two-thirds of the commercial energy used in the United States, and they are projected still to be furnishing more than half in the year 2000.

In addition to promoting a free-market economy and full deregulation of natural gas, the most vital component of Federal action is the timely development of oil and gas resources on federally managed areas of the Outer

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Continental Shelf. Federal OCS lands currently account for about 12 percent of all proved U.S. oil reserves and 19 percent of our total proved reserves of natural gas. Development of these resources does not mean a sacrifice of environmental quality goals,

because the environmental record of exploration and production companies operating on the OCS is excellent.

While U.S. production of oil has recovered from the lows of a few years ago, the Nation's oil and gas reserves have not risen. In response to the price rises of the 1970's and very early 1980's, they have only stopped falling sharply — oil reserves have fallen by less than 5 percent and gas reserves by less than 1 percent from 1980 to 1984. If this country fails to find and develop new oil and gas fields — and to squeeze every economical drop from existing reservoirs — it stands a chance of letting the progress of the past few years slip away. At the same time, the Interior Department's estimated (not proved) reserves on the OCS have been greatly diminished because the experience in the frontier areas of Alaska and the Atlantic coast has been disappointing. In spite of all the past optimism, there is not a single producing well in Federal waters off Alaska at present, and it is not clear to what extent there will be.

Because of the forgoing, the Administration opposes any moratorium on OCS leasing. By preventing development of domestic resources that are known to be available, delaying work on the OCS only strengthens OPEC's efforts to control production and raise prices. The Nation's dependence on imported oil increases, its energy security is lessened, and the pace of economic growth is inevitably slowed.

Along with OCS development, it is important that national energy policy buy more time for an eventual transition to renewable energy and alternative fuels by fully developing *onshore* oil and gas resources too. Market demands and private sector initiatives can coax 14 billion barrels of additional crude oil from existing U.S. oil fields through enhanced oil recovery — even if only today's technological know-how is applied across the board. This alone would increase recoverable reserves by roughly 50 percent, but the National Petroleum Council — a longtime advisory body to the Federal Government — says that advances in technology could double that increase. The size of the possible reward is worth giving it adequate free-market incentives; therefore, the Department of the Interior will continue to try to make

available for exploration and development oil and gas resources on Federal lands (which include the OCS), and the Department of Energy (DOE) also will continue its limited role in basic research that supports the development of new, advanced ways to increase oil recovery.

It is also essential that the remaining Federal price controls on natural gas be eliminated and that the Nation continue to move toward a more competitive system of transport for this fuel. Natural gas is the only primary fuel whose prices remain under controls, with the price of about half of all gas production still regulated by the Federal Government. As a result, "old gas" (including that from many fields that started production well after the oil embargo of 1973-74) is not coming to the marketplace as it could. A considerable amount is irretrievably lost in this way.

The complete elimination of oil price controls in 1981 and the partial decontrol of natural gas on January 1, 1985, demonstrated clearly that decontrol encourages more production — and thereby causes consumer prices to decline. Natural gas prices will be lower and total gas production will be higher by about 1 trillion cubic feet per year if all natural gas supplies are decontrolled.

Conservation. Energy conservation is an integral part of the "energy triad." It has proven to be the most expeditious way to reduce the need for new or imported energy resources; and in fact it now contributes more to balancing our national energy ledger than does any single fuel *source*.

Despite a 21-percent increase in the number of U.S. households since 1973, for example, current total energy consumption in the U.S. household sector is almost the same as it was 12 years ago. Savings in the industrial, commercial, and transportation sectors are similarly impressive. Even if current energy prices remained stable or declined moderately, it would appear to be economically feasible to continue efficiency gains at a substantial pace for the next 25 years.

Since the beginning of this Administration, the Department of Energy has been redirecting its research efforts in conservation technologies, usually in partnership with private industry. The central policy thrust has been to promote economically efficient

use of energy resources by minimizing Federal control and involvement in energy markets, and — through R&D — to increase the range of technological options available to the private sector.

The Administration also has sought to remove regulatory barriers that discouraged market response to conservation opportunities. Success in reducing inflation and interest rates has encouraged the up-front investments in conservation that can save money for energy consumers in the long run. The impetus for conservation is best left to the marketplace. Inequities and anomalies are created by government efforts to stimulate and subsidize specific technologies. Recent energy history has shown that U.S. consumers and producers are quick to take economical actions that improve the efficiency of energy use.

Coal. There is enough coal in this country to satisfy the Nation's current use rate well into the 23rd century. Coal accounts for about 80 percent of the recoverable fossil fuel resources in the United States. Conventional oil resources, on the other hand, make up only a small fraction of our known fossil resources. Yet many Americans still tend to think of coal as a symbol of the old "smokestack industries" — a resource with much to offer in terms of energy and economic security, but only at the expense of our environment. That stereotype is wrong.

Opportunities are just as ripe to advance the frontiers of coal technology as they are for any other energy option; and this is exactly what is being done. A modern coal-fired powerplant is cleaner than most older oil-fired plants. If regulations are made flexible enough to accept them, there are new technologies (such as fluidized-bed combustion and

coal-gasification combined-cycle plants) that already offer the potential for excellent environmental performance — at less cost, and with higher efficiencies.

Coal is another vital member of the energy triad. Since 1973, coal's share of the U.S. energy market has expanded by about one-third. It is increasingly the fuel of choice for utilities, which now generate approximately 55 percent of all electricity using coal.

The Federal Government owns more than 30 percent of the Nation's coal reserves, and this Administration will continue to try to make these resources available through leases to private producers. But opposition to Federal coal leasing poses a threat to availability of these resources. At the same time, the Department of Energy will support basic research that underlies the continuing development of methods to use coal with greater efficiency and with less adverse environmental effects.

Nuclear. Nuclear energy, the third member of the triad, is an energy source as vital to the United States as it is misunderstood. It has the best safety record of any large-scale commercial energy technology in human history. Nuclear power today is the second largest source of electricity in the United States, providing more than 15 percent of the Nation's electricity needs. It is expected to provide more than 18 percent of the Nation's electricity during the 1990's. As electricity provides an increasing share of U.S. energy needs, nuclear power will assume an increasingly important role — particularly if, as expected, its technology continues to improve.

Despite this, nuclear power has lost valuable ground as a future energy option. No nuclear powerplants have been ordered since 1978. Some have been canceled during late stages of construction. The U.S. commercial reactor industry is ailing. Yet the United States cannot afford to become a second-class nuclear power-producing country.

The Administration is pursuing a fivefold strategy to help make sure that nuclear powerplants remain an available option within the country's balanced and diversified energy supply mix. It has proffered specific legislation for licensing and regulatory reform. It is staying on track with the tightly scheduled, yet scrupulously careful development of high-level waste storage and ultimate disposal. It has focused fundamental R&D on programs that should contribute to greater safety margins, standardized plant designs, and more usable systems. It is endeavoring to make the American public better informed about the "how" and "why" of peaceful nuclear power. And, finally, it is working constantly to remove unnecessary barriers to those technology and equipment

exports that do not encourage the spread of nuclear weaponry. America's role as a reliable and effective global supplier of peaceful nuclear technology is, in fact, important to its continued influence in averting weapons proliferation.

Electricity. For most of the 20th century, the United States has led the world in the development and maintenance of a reliable, low-cost electricity supply system. Today the United States has a surplus of generating capacity; but this condition is likely to be temporary, given current expectations about future economic growth and concurrent growth in the demand for electricity. Investment in additional generating capacity will be needed; the challenge is to ensure that the most economically efficient generating technologies can be selected, and that capacity is augmented as the need for this develops.

A sufficient and efficient electricity supply system has enormous economic and strategic implications. Electricity is a critical ingredient for almost every economic enterprise in the United States. The electricity supply network is the medium through which some of the most important future energy resources — coal, nuclear, and renewables — will be delivered to their markets. Reliable, competitively priced electricity supplies are particularly important to "high technology" economic growth and development.

The electricity supply system is one of the most heavily regulated sectors in the U.S. economy. Many Americans have come to regard electricity as an "entitlement"; they expect that it will continue to be reliable and available with the flick of a switch whether or not its fair costs are covered by rates they pay. Unfortunately, things cannot work that way.

The central issue today is how best to balance the risks associated with investment in new generating capacity with the rewards to be gained from those investments once new facilities become operational. The traditional "utility compact" (no unusual risks, no unusual profits) is disintegrating because it is no longer balanced. Over the past decade, regulatory practices have made the risks associated with such investments very large while possible benefits to the investors remain limited. As a result,

many utility managers today are reluctant to undertake new investments, even if it appears that society will need them in the long term.

The Administration believes that the best way to ensure timely and appropriate investments in the electric utility sector is to develop and promote an improved regulatory environment that increases reliance on economic competition — among utilities, among generation technologies, and among end-use technologies. The outmoded Fuel Use Act and Holding Company Act should be repealed, some applications of the Public Utility Regulatory Policies Act deserve re-evaluation, and the Federal Energy Regulatory Commission should extend its experiments in the direction of free competition; but reform will still be gradual. Electricity regulation is an obligation shared by the Federal Government and all 50 States.

Renewables and Alternative Fuels. Renewable energy resources — now primarily wood and water — contribute about 9 percent of this country's domestic production. With the caveats outlined in the chapter entitled "Summary of Current Projections," this fifth National Energy Policy Plan (NEPP-5) projects that they could provide nearly 13 percent of the total domestic production of primary energy by the end of this century. This could rise to 15 percent by 2010, as more economical renewable energy technologies develop.

The Federal program in solar and other renewable energy research and development has addressed key, high-risk technical issues that will provide a scientific and engineering

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knowledge base for industry to develop renewable energy systems with greater efficiencies, longer system life, and lower system costs based on advances in the use of new materials.

Conclusion: Steering by the Signals

This Nation learned lessons about energy in the 1970's that it must never forget. During the first half of the 1980's, those lessons have been implemented in policy.

The resources the world needs are available. The earth has at least a 200-year supply of coal at current consumption rates. There are between 1 and 2 trillion barrels of recoverable crude oil resources in the world, an amount equal to many decades of global consumption at the current level of about 20 billion barrels per year. There are also an estimated 10,000 trillion cubic feet of ultimately recoverable natural gas, compared with current world consumption of about 50 trillion cubic feet per year. Over the past 30 years, the "life index" of the world's crude oil reserves has stayed at about 35 years (plus or minus 5), while the natural gas reserve life index has remained at about 50 years (again, plus or minus 5). The world's supply of uranium can sustain converter reactors well into the 21st century, and breeder technology could turn this fuel into a virtually unlimited supply.

But these worldwide physical resources are only part of the story. The United States' own rich endowment is but another part. This Nation's free-market economy also encourages timely innovation and technological change. It does so by rewarding those individuals who find economical solutions to current problems. Based on history, there is good reason to be confident that innovations in both production and conservation technologies will probably extend the benefits to be derived from the energy resources that are recognized now.

There is no secret to sustained progress toward energy stability, security, and strength. In 1981, the President challenged the Nation to look toward its future with confidence and optimism, to build on traditional values, and to move forward again. Today, that forward-looking optimism is stronger than ever in regard to energy. It is made so by the continued resurgence of the economy, the resultant drop in unemployment, and continued progress of American technology and scientific innovation.

These successes contradict the views some people held strongly only a few years ago — that the United States was running out of energy, and that shortages were inevitable. That pessimism translated into a government policy of allocation and price controls on energy — an approach that could be characterized as "allocating misery during shortage." Contrast it —

both in spirit and in substance — with part of the message of the President's second inaugural address on January 21, 1985: "There are no limits to growth and human progress when men and women are free to follow their dreams."

Today Americans have the luxury of planning — individually and collectively — for future energy needs in an atmosphere of calm, reasoned resolve. The Reagan Administration is confident, but it will not be complacent.

Given the right market signals, the right mix of Federal cooperation, and the right regulatory climate, the American economy has the competitive vigor and the inherent strengths to take new technologies off the drawing boards and put them into commercial practice. Using these tools, the Nation can look to a future of energy stability, security, and strength.

REPLY BRIEF

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IN THE
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OCTOBER TERM, 1986

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,
Petitioners,

v.

ISLA PETROLEUM CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals

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REPLY OF PETITIONERS IN SUPPORT OF PETITION FOR CERTIORARI

LYNN R. COLEMAN *
DOUGLAS G. ROBINSON
MATTHEW W.S. ESTES
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
919 Eighteenth Street, N.W.
Washington, D.C. 20006
(202) 463-8700

MARCOS A. RAMIREZ IRIZARRY
DENNIS A. SIMONPIETRI MONEFELDT
RAMIREZ & RAMIREZ
117 Eleanor Roosevelt Avenue
Hato Rey, Puerto Rico 00918
(809) 758-5660

* *Counsel of Record*

HECTOR RIVERA CRUZ
Secretary of Justice
Commonwealth of
Puerto Rico

RAFAEL ORTIZ CARRION
Solicitor General
Commonwealth of
Puerto Rico

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Energy Policy and Conservation Act, Title IV, 89 Stat. 941 (1975)	4, 5
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OTHER SOURCES:	
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

No. 86-1406

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,
Petitioners,
v.
ISLA PETROLEUM CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals

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REPLY OF PETITIONERS IN SUPPORT OF PETITION FOR CERTIORARI

ARGUMENT

In urging that the issues raised by DACO in its petition are not certworthy, the Respondents[1] attempt to convince the Court that TECA's decision below is an unremarkable one, solely affecting Puerto Rico, in which

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[1] Two briefs were filed on behalf of the various Respondents in this proceeding. The brief filed by Esso Standard Oil Co. (PR) and Caribbean Gulf Refining Corporation shall be referred to herein as "Esso-Gulf Br. at ——." The brief filed by the Shell Company (Puerto Rico) Limited, Mobil Oil Caribe, Inc., Phillips Puerto Rico Core, Inc., Texaco Puerto Rico, Inc., Cia. Petrolera Caribe, Inc., Isla Petroleum Corp. and Gasolinas de Puerto Rico Corp. shall be referred to herein as "Joint Br. at ——."

the court below simply applied applicable precedent. In discussing the case, however, the Respondents' own briefs could not avoid revealing that DACO's petition raises issues of great national importance that demand resolution by this Court:

> 1. This is the first and only case where state action has been held preempted in the absence of a currently effective federal statute, or a delegated action thereunder, requiring such result. The Respondents have failed to show that this is a routine and insignificant result.
>
> 2. TECA's decision is directly contrary to this Court's holding in *Tully*, and the Respondents' position that TECA faithfully followed applicable precedent (arguably this Court's *Transco* decision) can be valid only if it is concluded that *Tully* was wrongly decided.
>
> 3. TECA's interpretation of *Transco* runs counter to numerous decisions of this Court requiring affirmative evidence of Congress' preemptive intent. Left unreviewed, TECA's decision will at a minimum be disruptive of appropriate analysis in a variety of preemption cases in the future.

As demonstrated below, Respondents have not only failed to show that DACO's petition does not present significant issues, but Respondents' own words confirm their importance.

I. The Impact of TECA's Holding is Not Limited to Puerto Rico.

The Respondents argue that DACO's regulations are "not likely to be duplicated in any state, or even in Puerto Rico itself," and thus, the issues raised in DACO's petition "are not of national importance *at this time*." Joint Br. at 4-5 (emphasis in original). *See also* Esso-Gulf Br. at 7.

Respondents' attempts to downplay the importance of this case are not shared, however, by other parties who

also may be affected by its outcome. Despite the abbreviated time periods permitted for petitions for certiorari to TECA, twelve states and the National Association of State Energy officials, which represents the interests of the energy officials of all the States,[2] have filed *amicus curiae* briefs supporting DACO's position.

At the other end of the spectrum, concern as to the outcome of this proceeding has also been expressed by the petroleum industry. The American Petroleum Institute, of which all the major oil company respondents are members, provided the following statement to TECA when it moved to intervene as an *amicus curiae*:

> Because of the presence in this appeal of the preemption issue, a decision by this Court *will have a nationwide importance*, as it will bear strongly on the question of whether the enactment of potentially more than 50 different sets of state laws and regulations governing pricing and allocation for petroleum producers, refiners and marketers is permissible.

App. A. 2a (emphasis added).

Given the expressions of interest in this case by parties representing the entire spectrum of interests involved,

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[2] The energy officials' concern is not of hypothetical invalidation of statutes not yet enacted, but of the invalidation of the scores of statutes that are already on the books. The extent of such regulation, enacted by at least 41 states, is detailed in O'Donnell and Glassman, *Energy Emergencies: Constitutional Constraints on State Efforts to Control Oil Supplies and Prices*, 5 Energy Law Journal 77 (1984). In one of the most ironic twists in this case, the district court held that while state petroleum regulation was preempted, state measures during a petroleum supply emergency (about which the energy leadership of the Congress has expressed concern) would not be preempted. Pet. App. A at 18a. TECA affirmed this holding, which will require it to review these state statutes to determine if they are truly "emergency only" in scope and whether, in fact, an emergency exists which would allow the triggering of such statutes. This could cause enormous confusion should the United States be confronted with a supply shortage.

there can be no doubt of the national importance of the issues raised by DACO's petition. These issues should not have their ultimate resolution in a split TECA decision, but instead should be decided by this Court.

II. Congress Has Not Implemented a National Energy Deregulation Policy Binding Upon the States.

The central thesis of the Respondents' argument in support of TECA's decision is that Congress, in enacting the EPCA amendments[3] to the EPAA,[4] chose "to implement for the first time a bold national strategy, whose centerpiece was an unregulated petroleum market free of all government interference." Esso-Gulf Br. at 12. *See also* Joint Br. at 6 ("petitioners seek to upset national policy decisions which evolved from complete regulation to partial regulation to no regulation"). The wide ranging implication of this fundamental premise, which has never been validated by this Court,[5] strongly calls for Supreme Court review.

Had Congress intended to implement such a "bold national strategy," it should be expected that Congress would have clearly demonstrated its intent to require, for the indefinite future, the States to forego the exercise of their police powers over local activities of the petroleum industry.[6] Yet, far from highlighting any intent to implement such a strategy, Congress failed to include in the EPCA amendments any provision directly or indirectly affecting the States' authority to regulate local petroleum markets subsequent to the expiration of federal regulatory authority.

Nor does the legislative history of the EPAA or the EPCA amendments provide any real evidence that Congress intended to implement such a national energy policy. None of the Respondents, in the course of their detailed discussion of EPCA's legislative history, cite any instance where Congress even discussed the issue of the authority of the states to regulate local petroleum markets subsequent to the expiration of federal controls, much less indicated an intent to preempt such authority. Indeed, the Respondents' briefs are devoid of any specific reference by Congress to the post-EPAA period whatsoever.[7]

Finally, the significance of the post-EPAA legislative/administrative history, which TECA mistakenly read as supporting its conclusion of total preemption, has never been assessed by this Court. In DACO's view, the passage and veto of the SPAA,[8] the enactment of the EEPA,[9]

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[3] Energy Policy and Conservation Act, Title IV, 89 Stat. 941 (1975).

[4] Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751-760g.

[5] Indeed, this Court's decision in *Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982), effectively holds that Congress did *not* intend any sweeping policy of total deregulation binding upon the states to be effective subsequent to the termination of the EPAA.

[6] As this Court has repeatedly stressed, before there can be a finding that state regulation is preempted, there must be "clear and manifest" evidence of Congress' intent to do so. *See, e.g. International Paper Co. v. Ouellette*, 107 S. Ct. 805, 811 n.11 (1987); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

[7] The passage from the legislative history chiefly relied upon by the Respondents is a statement from the EPCA Conference Report that Congress intended to assure a "smooth transition of petroleum markets from a closely regulated state to a large[ly] unregulated status subject to standby pricing and allocation authority." S. Conf. Rep. No. 516, 94th Cong., 1st Sess. 204, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1956, 2045. Joint Br. at 8; Esso-Gulf Br. at 11. This statement, with its reference to standby pricing and allocation authority, clearly refers to the 28-month period from May 1979 through September 1981 when the President had discretionary authority to remove or reimpose controls. It says nothing about the period following expiration of the EPAA.

[8] Standby Petroleum Allocation Act, S. 1503, 97th Cong., 2d Sess., 128 Cong. Rec. H409 (daily ed. Feb. 22, 1982).

the Attorney General's Report to Congress,[10] and subsequent failed attempts to enact preemptive legislation [11] are all strongly indicative of a complete absence of any congressional intent to preempt state authority after the EPAA expired. TECA concluded that it is "inconceivable" that Congress could have intended to permit states to regulate the market subsequent to the expiration of federal controls.[12] This inference, based upon nothing in the statute or legislative history, is hardly convincing "evidence" that Congress implemented a bold new strategy with overriding national effect. As this Court has noted, in preemption cases, "it is necessary to look beyond general expressions of 'national policy' to specific federal statutes with which the state law is claimed to conflict." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981).

III. Preemption Analysis Does Not Change in the Context of Federal Deregulation.

The Respondents also urge that a new principle should apply to preemption analysis in the context of federal deregulation. Relying upon *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 106 S. Ct. 709

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[9] Energy Emergency Preparedness Act of 1982, 42 U.S.C.A. §§ 6281-6282 (1983).

[10] *See* Pet. at 19 n.30.

[11] *See* Pet. at 18-19.

[12] The Respondents argue that Congress cannot be imputed to have intended to permit state regulatory authority given the elaborate scheme for phasing out federal price controls. Esso-Gulf Br. at 11-12; Joint Br. at 9. In making this argument the Respondents repeat the error committed by TECA. The proper inquiry in a preemption case is not whether Congress intended to preserve state authority, but whether there is a clear and manifest congressional intent to preempt state authority. *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 387 n.11 (1983). *See* Pet. at 22-23.

(1986) ("*Transco*"), the Respondents argue that in a deregulation context, "the presumption against preemption is overcome by a showing that Congress intended the free market alone to dictate prices." Esso-Gulf Br. at 10.[13]

This assertion, too, raises an issue of first impression that should be resolved by this Court, for *Transco* does not stand for any such general principle of preemption analysis. To begin, nowhere in *Transco* did this Court make any statement to the effect that it was departing from traditional preemption analysis in the context of "deregulation." Indeed, the Court in *Transco* did not view the federal statute at issue as "deregulating" the natural gas industry, but rather as "revising a comprehensive federal regulatory scheme," and "in some respects expand[ing] federal control." 106 S. Ct. at 716-717. The chief ground for the Court's determination that the state regulation was preempted in *Transco* was that the federal government has *continuing* regulatory responsibility with respect to the natural gas which the state sought to regulate. 106 S. Ct. at 717. These clear grounds of distinction from the present case were ignored by TECA.

The applicable lesson from *Transco* for this case should be that this Court has continued to require clear and manifest evidence of congressional intent to preempt state regulation. *See* Pet. at 20-24. TECA's decision and the Respondents' assertion that *Transco* requires that a new analysis should apply to deregulation cases announces for the first time a preemption theory that, given the recent trend towards federal deregulation, requires this Court's attention.

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[13] Not surprisingly, the Respondents' formulation of this principle precedes their discussion of EPCA's legislative history, a discussion devoid of any reference to expressions of specific congressional intent to preempt. Moreover, the EPCA Conference Report does not even say that Congress intended to create a "free market." *See* Pet. at 23 n.34.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioners respectfully request that this Court issue a writ of certiorari to the Temporary Emergency Court of Appeals.

Respectfully submitted,

LYNN R. COLEMAN *
DOUGLAS G. ROBINSON
MATTHEW W.S. ESTES
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
919 Eighteenth Street, N.W.
Washington, D.C. 20006
(202) 463-8700

MARCOS A. RAMIREZ IRIZARRY
DENNIS A. SIMONPIETRI MONEFELDT
RAMIREZ & RAMIREZ
117 Eleanor Roosevelt Avenue
Hato Rey, Puerto Rico 00918
(809) 758-5660

HECTOR RIVERA CRUZ
Secretary of Justice
Commonwealth of
Puerto Rico

RAFAEL ORTIZ CARRION
Solicitor General
Commonwealth of
Puerto Rico

* *Counsel of Record*

Dated: April 20, 1987
Washington, D.C.

APPENDIX

IN THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES OF AMERICA

ISLA PETROLEUM CORPORATION, *et al.*,
Plaintiffs-Appellees,

vs.

PUERTO RICO DEPARTMENT OF
CONSUMER AFFAIRS, *et al.*,
Defendants-Appellants.

No. 1-16

MOTION OF AMERICAN PETROLEUM INSTITUTE FOR LEAVE OF COURT TO FILE AMICUS CURIAE BRIEF

The American Petroleum Institute ("API") respectfully moves this Court, pursuant to this Court's Rule 21 and Fed. R. App. P. 29, for leave to file the attached brief as an *amicus curiae* in this action.

This appeal involves the validity of an order specifying maximum profit margins for petroleum product wholesalers issued by the Puerto Rico Department of Consumer Affairs pursuant to a Puerto Rico statute, 23 L.P.R.A. § 734. The court below held that order to be preempted by the federal policies underlying the Emergency Petroleum Allocation Act of 1973, Pub. L. No.

93-159, 87 Stat. 627 (codified as amended at 15 U.S.C. §§ 751-760h) ("EPAA"), and therefore enjoined its enforcement. Puerto Rico appeals, and asks this Court to reverse the district court's judgment.

Because of the presence in this appeal of the preemption issue, a decision by this Court will have nationwide importance, as it will bear strongly on the question of whether the enactment of potentially more than 50 different sets of state laws and regulations governing pricing and allocation for petroleum producers, refiners, and marketers is permissible.

API is a trade association composed of American producers, refiners, and marketers of crude oil and refined petroleum products, who all obviously have a significant interest in the outcome of this litigation. An *amicus curiae* brief filed by API, reflecting the views of these affected individuals, would therefore be an invaluable aid to the Court in the resolution of this matter.

For the foregoing reasons, API respectfully requests that its motion for leave to file an *amicus curiae* brief be granted and that the *amicus curiae* brief attached hereto be accepted for filing.

Respectfully submitted,

/s/ Thomas A. Lorenzen
Daniel Joseph, P.C.
Thomas A. Lorenzen

AKIN, GUMP, STRAUSS,
HAUER & FELD
1333 New Hampshire Ave., N.W.
Suite 400
Washington, D.C. 20036
(202) 887-4052

Counsel for the American
Petroleum Institute

OPPOSITION

BRIEF

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NO. 86-1406

IN THE

Supreme Court of the United States

October Term, 1986

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, et al.,

Petitioners,

v.

ISLA PETROLEUM CORPORATION, et al.,

Respondents.

ON PETITION FOR CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

RESPONDENTS' OBJECTION AND RESPONSE TO AMICUS CURIAE BRIEF SERVED BY THE NATIONAL ASSOCIATION OF STATE ENERGY OFFICIALS

Igor Domínguez
WILLIAM ESTRELLA LAW OFFICES
Counsel for Texaco Puerto Rico, Inc.
P.O. Box S-4826
San Juan, Puerto Rico 00905
(809) 721-7481

Rafael Pérez-Bachs*
Néstor M. Méndez-Gómez
Maggie Correa-Avilés
Ana Matilde Nin
Arturo J. García-Solá
McCONNELL VALDES KELLEY SIFRE GRIGGS & RUIZ-SURIA
Counsel for The Shell Company (Puerto Rico) Limited, Mobil Oil Caribe, Inc. and Phillips Puerto Rico Core, Inc.
G.P.O. Box 4225
San Juan, Puerto Rico 00936
(809) 759-9270

Alvaro R. Calderón, Jr.
Counsel for Isla Petroleum Corp. and Gasolinas de Puerto Rico Corp.
P.O. Box 2219
Hato Rey, Puerto Rico 00919
(809) 753-5050

Carlos F. López
Celso E. López
Counsel for Cía. Petrolera Caribe, Inc.
P.O. Box 8852
Santurce, Puerto Rico 00910
(809) 721-5037

*Counsel of Record

PUBLISHING RESOURCES, INC. SAN JUAN, PUERTO RICO

Respondents The Shell Company (Puerto Rico) Limited, Mobil Oil Caribe, Inc., Phillips Puerto Rico Core, Inc., Texaco Puerto Rico, Inc., Isla Petroleum Corp., Gasolinas de Puerto Corp. and Cía. Petrolera Caribe, Inc.,[1] pursuant to Rules 36.3. and 42.4., object to the *amicus curiae* brief served by the National Association of State Energy Officials ("Association"),[2] on the following grounds:

1. Association, not being a State, Territory, Commonwealth or a political subdivision thereof, did not request appearing respondents' written consent but has requested leave to file an *amicus* brief, joining the States of New York, Connecticut, Maryland and New Jersey.

2. Appearing respondents object to Association's motion for leave to file said *amicus* brief, on the ground that certain statements made at pp. 2-3 therein are not accurate.

3. Particularly, it is stated therein that T.E.C.A.'s holding may "prevent enforcement" or "upset the administration" of certain New York, Connecticut and New Jersey[3] statutes, to wit:

   (a) N.Y. Gen. Bus. Law Sec. 396-r. (McKinney 1984);
   (b) Conn. Gen. Stat. Sec. 21a-78a. (1987); and
   (c) N.J. Stat. Ann. Sec. 56:6-2. (West 1987).

4. T.E.C.A.'s decision affirmed a trial court judgment which appears at 640 F. Supp. 474 (D.P.R. 1986) and in petitioners' supplemental appendix ("Pet. SA"). The trial court held, 640 F. Supp. 474 at 514-515, Pet. SA 85-86:

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[1] Appearing respondents incorporate by reference their Rule 28.1 listing of April 10, 1987.

[2] Received by counsel of record in typewritten form on April 20, 1987.

[3] Although Association also joins Maryland, no specific Maryland statutes or regulations are mentioned. Another *amicus* brief, joined by other states, mentions no specific state statutes or regulations.

Thus, there are many types of petroleum-related state laws that would not be preempted provided that such laws satisfy the criteria in the above discussion so as to escape preemption. Such laws can be grouped in three categories: (1) those providing the Governor with emergency powers to respond to natural and physical disasters affecting public health and safety; (2) laws that promote energy conservation, or restrain demand for petroleum products at the retail level, but would not significantly impede the operation of the federal allocation program; and (3) laws designed to accomplish regulatory goals unrelated to emergency preparedness, including consumer education and fair trade supervision.

The first category would include those state laws providing for emergency allocation of petroleum products to alleviate a shortage within the state caused by damage to or destruction of facilities located within the United States and resulting from sabotage, accidents, or an act of God.

Examples of laws in the second category are those that promote the conservation of petroleum products, such as laws creating state conservation programs pursuant to the Energy Emergency Conservation Act of 1979, provided such programs do not include allocation and price controls. Also included are state laws that restrain retail demand for petroleum products, such as odd-even management programs, minimum purchase requirements, carless day and parking restrictions, fuel switching requirements, car pooling programs, and speed limits. Also, the states' antitrust and taxing laws are not to be affected.

5. A comparison of the New York, New Jersey and Connecticut statutes cited in the *amicus* brief with the trial court's holding quoted above leads to the conclusion that the administration of these states' laws has not been "upset," nor their enforcement "prevented," because the trial court's judgment affirmed by T.E.C.A. *expressly excepted* such state laws from the preemption holding. The New York and Connecticut statutes fall clearly within the first category found by the trial court to be excepted from preemption ("emergencies regulation") and the New Jersey statute falls clearly within the third category found by the trial court to be excepted from preemption (fair trade or consumer education statutes). To attempt to convey the contrary impression is not accurate, and thus objectionable.

Wherefore, appearing respondents very respectfully demand that Association be denied leave to file its *amicus* brief.

Respectfully submitted in San Juan, Puerto Rico, on April 24, 1987.

Igor Domínguez
WILLIAM ESTRELLA
LAW OFFICES
Counsel for Texaco
Puerto Rico, Inc.
P.O. Box S-4826
San Juan, Puerto Rico 00905
(809) 721-7481

Rafael Pérez-Bachs*
Néstor M. Méndez-Gómez
Maggie Correa-Avilés
Ana Matilde Nin
Arturo J. García-Solá
McCONNELL VALDES KELLEY
SIFRE GRIGGS & RUIZ-SURIA
Counsel for The Shell Company
(Puerto Rico) Limited,
Mobil Oil Caribe, Inc. and
Phillips Puerto Rico Core, Inc.
G.P.O. Box 4225
San Juan, Puerto Rico 00936
(809) 759-9270

Alvaro R. Calderón, Jr.
Counsel for Isla Petroleum
Corp. and Gasolinas de
Puerto Rico Corp.
P.O. Box 2219
Hato Rey, Puerto Rico 00919
(809) 753-5050

Carlos F. López
Celso E. López
Counsel for Cía. Petrolera
Caribe, Inc.
P.O. Box 8852
Santurce, Puerto Rico 00910
(809) 721-5037

*Counsel of Record

SUPPLEMENTAL

BRIEF

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No. 86-1406

IN THE
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v.

ISLA PETROLEUM CORPORATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES

JAIME SIFRE-RODRIGUEZ
LUIS SANCHEZ-BETANCES
SANCHEZ-BETANCES & SIFRE
Banco Central Building
Suite 700
Hato Rey, Puerto Rico
00917-1866
(809) 756-7880

NOEL S. GONZALEZ-MIRANDA
MARIO L. PANIAGUA
SWEETING, GONZALEZ & CESTERO
Banco Central Building
Suite 400
Hato Rey, Puerto Rico
00917-1866
(809) 756-7150

DONALD B. CRAVEN *
MARK L. EVANS
JAMES P. TUITE
MILLER & CHEVALIER, Chartered
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5701
(202) 626-5800

Attorneys for Respondents Esso Standard Oil Co. (P.R.) and Caribbean Gulf Refining Corporation

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board, 474 U.S. 409, 106 S. Ct. 709 (1986) ..... *passim*
Transcontinental Gas Pipeline Corp. v. State Oil & Gas Board, 457 So.2d 1298 (Miss. 1984), *rev'd*, 474 U.S. 409, 106 S. Ct. 709 (1986) 4, 5
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On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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RESPONDENTS' SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF FOR THE UNITED STATES

The Solicitor General, without saying so, both repudiates the position advocated by his predecessor only two years ago in *Transco* and discredits the preemption standard adopted by the Court in that case—a standard to which all nine Justices subscribed. The Solicitor General's current position—that conventional principles of implied preemption have little or no application to federal deregulation—conforms to the litigation strategy recommended by the Administration's Working Group on Federalism, whose recent report sharply criticized this Court's implied preemption decisions. But a shift in the Administration's preemption policy is not a reason to grant certiorari in this case, and the Solicitor General's

brief provides neither a principled basis for distinguishing *Transco* nor any reason to reconsider it.

The Solicitor General does not dispute TECA's holding that, when Congress in the EPCA provided for gradual termination of federal price controls, its purpose was "to allow market forces to operate freely." Pet. App. 13a. Nor does he question TECA's determination that "DACO's price controls interfere with and obstruct Congress' goal of letting market forces set prices and allocate petroleum products." Pet. App. 17a.

The Solicitor General argues, however, that Puerto Rico's frustration of "Congress's over-all purpose" (Br. 15) is not a proper basis for preemption in this case. He offers essentially three reasons for his position. First, no "extant provision of federal law" embodies the Congressional purpose. Br. 14. Second, a Congressional intention to permit free-market pricing is insufficient to preempt state-imposed price controls; Congress must "affirmatively prohibit state regulation" if it wishes to preempt state controls following the termination of federal authority. Br. 16. Third, *Tully* bars preemption in this case. Br. 9-10, 14. None of these reasons withstands analysis.

1. In the EPCA, Congress enacted a comprehensive national energy policy designed to reduce the Nation's dangerous reliance on foreign oil supplies. At the heart of that policy was the compromise with President Ford on petroleum price deregulation. Title IV of the Act amended various provisions of the EPAA to implement the compromise. Section 461, 89 Stat. 955, added a new section 18 to the EPAA—it provided that the President's regulatory authority would become discretionary 40 months after enactment and would terminate completely in September 1981.

The EPCA is unquestionably an "extant" federal law. Its ongoing programs and policies remain vital to the

Nation's energy security. Today, no less than when it was adopted in 1975, the centerpiece of the EPCA's scheme is the continuation after September 1981 of unregulated petroleum markets free of all government control.

The Solicitor General insists, however, that the Congressional purpose to achieve and maintain unregulated petroleum markets is not "embodied in a federal statute." Br. 12. His theory apparently is that the only provision in which the Congressional intent can properly be "embodied" is the single section that provided for final termination of federal regulatory authority. And that section, he argues, has no preemptive force because it is no longer "extant," having been "fully executed" when its deregulatory purpose was accomplished in September 1981. Br. 13.

The argument makes little sense. It assumes that section 461 of the EPCA bears no relationship at all to the remaining provisions of the statute, when in fact it was a critical component of the overall legislative design. To say that section 461 is not "extant" because it has fulfilled its purpose, and that the remainder of the statute, while "extant," cannot "embody" Congress's deregulatory purpose, is to erect pointless barriers to the fulfillment of Congressional intent.

The Solicitor General's theory, moreover, is incompatible with this Court's decision in *Transco*. There, as here, Congress enacted a comprehensive energy statute built in large measure on principles of free-market pricing. Section 601 of the NGPA, 15 U.S.C. § 3431, provided, in language comparable to section 461 of the EPCA, that in November 1978 federal jurisdiction to regulate wellhead sales of certain categories of natural gas under the Natural Gas Act would terminate. Section 601 was no less "fully executed" in November 1978 than section 461 of the EPCA was in September 1981. Nor was section 601 any more integral to the NGPA's scheme

than section 461 was to the EPCA's scheme. Just as the Congressional purpose in the NGPA retained its preemptive force after natural gas deregulation was accomplished, the free-market purpose in the EPCA remains preemptive after petroleum price deregulation.

2. The Solicitor General focuses most of his attention on the preemption standard applicable to federal deregulation. His position is this: a Congressional enactment *terminating* rather than *creating* federal regulatory authority can preempt state regulation only if Congress "affirmatively prohibit[s] state regulation" (Br. 16) or "directly indicate[s]" a specific "intent" to "bar state regulation." Br. 15. An "over-all purpose" to achieve a free market, in the Solicitor General's view, can have no preemptive force, at least in the absence of "legislative history directly relating to [the] subject" of "continuing preemption." *Id.* In other words, the implied preemption standard of *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)—that state law is preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"—does not apply in the case of deregulation if the only Congressional purpose that can be discerned is to establish an unregulated market free of government controls.

But this Court reached precisely the opposite conclusion in *Transco*. The Mississippi Supreme Court there had rejected preemption on the same theory that the Solicitor General advances here—that when Congress terminated federal jurisdiction over wellhead sales of natural gas, it made no affirmative determination "that wellhead prices of deregulated gas [must] be left unregulated by the states as well." *Transcontinental Gas Pipeline Corp. v. State Oil & Gas Board*, 457 So.2d 1298, 1318 (Miss. 1984), *rev'd*, 106 S. Ct. 709 (1986). The state court explained, in language that might easily fit in the Solicitor General's brief in this case: "However consistent a continued proscription on state regulation

might have been with the theoretical underpinnings of deregulation, the Congress in NGPA in 1978 did not ban state regulation of deregulated gas." 457 So.2d at 1318.

When the case reached this Court on appeal, Solicitor General Lee submitted an amicus brief supporting preemption. His principal argument was that the state court had applied the wrong standard. In his view, because Congress had decided in the NGPA "to subject certain wellhead sales to the free play of economic forces, its decision is entitled to preemptive force as against state efforts to regulate the area." Brief for the United States and the Federal Energy Regulatory Commission at 13. Solicitor General Lee acknowledged that "the NGPA does not, in so many words, bar state control over wellhead sales in interstate commerce." *Id.* at 15. Relying on the *Hines v. Davidowitz* standard, however, he argued that the ratable-take order at issue was preempted because it "significantly frustrates the free market policies embodied in the NGPA." *Id.* at 14.[1]

This Court agreed. It held: "To the extent that Congress denied FERC the power to regulate affirmatively particular aspects of the first sale of gas, it did so because it wanted to leave determination of supply and first-sale price to the market." 106 S. Ct. at 717. The state's ratable-take order "impermissibly intrude[s] upon federal concerns" because it "directly undermines Congress' determination that the supply, the demand, and the price of high-cost gas be determined by market forces." *Id.* at 716-17. The Court thus rejected the state

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[1] Solicitor General Lee argued alternatively that, even if the NGPA's free-market purpose were not itself preemptive of state regulation, the order at issue would be invalid because it conflicted with FERC's continuing regulatory jurisdiction over matters other than wellhead sales. Brief at 17-26.

court's theory that federal deregulation can preempt state regulation only if Congress expressly so provides.[2]

The dissenting Justices, while differing with the Court over whether the ratable-take order interfered with market forces, agreed with the majority's formulation of the applicable preemption standard. They stated: "The purpose of the NGPA with respect to high-cost gas is to eliminate governmental controls on the wellhead price of such gas. State regulation that interferes with this purpose is preempted." *Id.* at 722 (footnote omitted).

Against this background, the Solicitor General's brief in the present case is remarkable on at least two counts. First, without explanation, it contradicts the position advanced by Solicitor General Lee just two years ago in *Transco*. Second, while pointing to supposedly distinguishing features of the two cases, the brief nonetheless unmistakably disapproves the preemption standard that the Court adopted and that all members endorsed in *Transco*.

The Solicitor General says that this case is altogether different from *Transco* because "the express basis of preemption in *Transco* was the continuing existence of a 'comprehensive federal regulatory scheme' . . . , one feature of which was reliance on the market in certain respects." Br. 10. We read *Transco* differently. The Court there focused, as did Solicitor General Lee, principally on the NGPA's deregulation of wellhead sales and only secondarily on the FERC's residual jurisdiction over other aspects of the natural gas industry. It was the free-market objective of deregulation, more than the agency's continuing regulatory jurisdiction, with which the Mississippi regulation interfered. The Court's own formulation of the preemption standard, which appears nowhere in the Solicitor General's brief in the present case, suggests strongly that the Court's decision was predicated chiefly on the Congressional decision "to leave determination of supply and first-sale price to the market." 106 S. Ct. at 717.

[2] The majority opinion, like Solicitor General Lee's brief, buttressed its preemption holding by reference to FERC's residual authority over aspects of the natural gas industry other than sales at the wellhead. 106 S. Ct. at 717-18. It returned, however, to its central point. It held that the NGPA's deregulation "rested in significant part on the belief that direct federal price control exacerbated supply and demand problems by preventing the market from making long-term adjustments" and that the state's "actions threaten to distort the market once again by artificially increasing supply and price," thereby "postpon[ing] achievement of Congress' aims in enacting the NGPA." *Id.* at 718. The Court "therefore conclude[d] that Mississippi's ratable-take order is pre-empted." *Id.*

In any event, the distinction is an empty one. Here, just as in *Transco*, the EPCA is a continuing comprehensive federal scheme, a central feature of which is reliance on market forces. The only difference is that, whereas the NGPA *partially* deregulated the wellhead price of natural gas, the EPCA *totally* deregulated petroleum price and allocation. The Solicitor General's distinction thus reduces to an assertion that partial deregulation should have greater preemptive effect than total deregulation. But that is backwards. Total deregulation ordinarily reflects a stronger, not weaker, reliance on market forces and to that extent should exert greater, not lesser, preemptive force.

The Solicitor General's theory, moreover, would produce bizarre consequences. According to his standard, the state's ratable-take order in *Transco* would not have been preempted if Congress, to achieve an even broader reliance on market forces, had totally rather than partially deregulated natural gas price and supply. Likewise, the Solicitor General would support TECA's decision in this case if Congress, instead of deregulating all petroleum products, had terminated only gasoline price controls while retaining federal regulatory authority over other refined products. There is no logic to these results.

At bottom, the Solicitor General is dissatisfied with the implied preemption standard that the Court applied in *Transco*. His turnabout on this issue corresponds to the recommendations contained in a report issued recently by the Administration's Working Group on Federalism, *The Status of Federalism in America* (Nov. 1986).[3] In its section on preemption (pp. 37-42), in which it singled out for particular criticism this Court's implied preemption decisions, the Report concluded that "there is little question that the courts have improperly invalidated constitutional exercises of state sovereign authority." *Report* at 42. Included among its proposed "reforms to promote federalism" (*Report*, Executive Summary at 6) was a recommendation to "[a]dvance pro-federalism positions through litigation." Executive Summary at 9. In the case of preemption, the proposal stated: "Arguments that a federal statute or administrative regulation preempts state law should be advanced only if the law or regulation by its terms preempts state law (or there is some other firm and palpable evidence compelling the conclusion that Congress intended preemption of State law), or if the requirements of state law are irreconcilable with the requirements or express purposes of that federal law or regulation." *Id.*

The Solicitor General's brief in this case is consistent with the Report's conclusions and recommendations. It is not, however, consistent with this Court's decision in *Transco*. Neither the Administration's disapproval of implied preemption nor the Solicitor General's disaffection from the principles established so recently in *Transco* provides a sufficient reason for this Court to reconsider those principles in this case.[4]

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[3] We have lodged a copy of the report with the Clerk.

[4] We explained in our Brief in Opposition (p. 10) why it is inaccurate to say, as the Solicitor General does, that TECA has "reverse[d] the normal presumption regarding preemption." Br.

3. Contrary to the Solicitor General's view, *Tully* is not a barrier to preemption here. As he acknowledges, "the case had not been briefed on the merits and the effect of the expiration of federal regulatory authority does not appear to have been raised explicitly." Br. 10 n.3. More important, no party in *Tully* addressed the critical question in this case—whether Congress intended in the EPCA to allow market forces alone to determine petroleum prices.

It has long been the rule that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925). *Accord Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 656 n.8 (1981); *Adams v. Texas*, 448 U.S. 38, 45 n.3 (1980). In a case strikingly similar to this one, the Court refused to give controlling effect to one of its own prior decisions because no party there had "brought to the Court's attention" a Congressional "change of policy" that was crucial to a correct understanding of the legislative purpose. *Great Northern Railway Co. v. United States*, 315 U.S. 262, 279 (1942).

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18. The language in the TECA opinion on which the Solicitor General relies was drawn directly from *Transco*. But neither this Court there nor TECA here rested its decision on an inverted presumption. TECA properly determined, without presuming the answer, that Congress "clear[ly]" intended "to allow market forces to operate freely." Pet. App. 13a. Under *Transco*, that is the controlling test. In *Alaska Airlines, Inc. v. Brock*, 107 S. Ct. 1476, 1481 n.7 (1987), this Court rejected a similar claim that a Court of Appeals had "formulated a completely new standard." In this case, as in that one, "when the court's analysis is viewed in its entirety, it is plain that the correct standard was applied." *Id.*

Since the Court in *Tully* neither considered nor addressed the issue squarely raised in this case, that decision does not foreclose the result reached by TECA.

Respectfully submitted,

JAIME SIFRE-RODRIGUEZ
LUIS SANCHEZ-BETANCES
SANCHEZ-BETANCES & SIFRE
Banco Central Building
Suite 700
Hato Rey, Puerto Rico
00917-1866
(809) 756-7880

NOEL S. GONZALEZ-MIRANDA
MARIO L. PANIAGUA
SWEETING, GONZALEZ & CESTERO
Banco Central Building
Suite 400
Hato Rey, Puerto Rico
00917-1866
(809) 756-7150

DONALD B. CRAVEN *
MARK L. EVANS
JAMES P. TUITE
MILLER & CHEVALIER, Chartered
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5701
(202) 626-5800

Attorneys for Respondents Esso Standard Oil Co. (P.R.) and Caribbean Gulf Refining Corporation

* Counsel of Record

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OPPOSITION

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NO. 86-1406

IN THE
Supreme Court of the United States
October Term, 1987

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, et al.,

Petitioners,

v.

ISLA PETROLEUM CORPORATION, et al.,

Respondents.

ON PETITION FOR CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

Igor Domínguez
WILLIAM ESTRELLA LAW OFFICES
Counsel for Texaco Puerto Rico, Inc.
P.O. Box S-4826
San Juan, Puerto Rico 00905
(809) 721-7481

Rafael Pérez-Bachs*
Néstor M. Méndez-Gómez
Maggie Correa-Avilés
Ana Matilde Nin
Arturo J. García-Solá
McCONNELL VALDES KELLEY SIFRE GRIGGS & RUIZ-SURIA
Counsel for The Shell Company (Puerto Rico) Limited, Mobil Oil Caribe, Inc. and Phillips Puerto Rico Core, Inc.
G.P.O. Box 4225
San Juan, Puerto Rico 00936
(809) 759-9270

Alvaro R. Calderón, Jr.
Counsel for Isla Petroleum Corp. and Gasolinas de Puerto Rico Corp.
P.O. Box 2219
Hato Rey, Puerto Rico 00919
(809) 753-5050

Carlos F. López
Celso E. López
Counsel for Cía. Petrolera Caribe, Inc.
P.O. Box 8852
Santurce, Puerto Rico 00910
(809) 721-5037

*Counsel of Record

PUBLISHING RESOURCES, INC. SAN JUAN, PUERTO RICO

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Respondents The Shell Company (Puerto Rico) Limited, Mobil Oil Caribe, Inc., Phillips Puerto Rico Core, Inc., Texaco Puerto Rico, Inc., Isla Petroleum Corp., Gasolinas de Puerto Rico Corp. and Cía. Petrolera Caribe, Inc.,[1] pursuant to Rule 36.5., hereby respond to the *amicus curiae* brief submitted by the United States,[2] as follows:

1. The United States contends that this case merits review, and therefore certiorari should issue, for various reasons. With all due respect, appearing respondents disagree.

2. The United States claims that "TECA's decision invalidated an important and long-standing policy of the Commonwealth of Puerto Rico," that said decision "strikes at a long-standing and important policy of the Commonwealth of Puerto Rico" and that said decision "invalidated a body of law of great importance to a territory that enjoys considerable sovereignty," one which "Congress has determined ... should have substantial domestic autonomy." (United States' Brief, hereinafter "Brief," pp. 9 - 11).

3. No such "policy" or "body of law" was voided by the decision of the trial court, affirmed by TECA. Three "temporary" regulatory orders were invalidated. They do *not* reflect Puerto Rico's "long-standing policy" but rather contradict it. As found by the trial court, for several years prior to the spring of 1986, Puerto Rico's policy was *not* to regulate, but rather one of merely "monitoring" a *de facto* deregulated, free competition market. Pet. SA 25, n. 9, 34.[3] The last of the three "temporary"

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1. Appearing respondents incorporate by reference their Rule 28.1. listing of April 10, 1987.

2. Received by counsel of record on August 28, 1987.

3. References herein to the appendix to the petition for certiorari are abbreviated as "Pet. App." and to the supplemental appendix to said petition as "Pet. SA".

orders states that Puerto Rico's policy is "returning, as quickly as possible,[4] to primary reliance on competitive market forces to regulate gasoline markets in Puerto Rico." Pet. App. 57a. Thus, in a real sense, TECA's decision results in a reaffirmation of Puerto Rico's policy.

TECA's decision also reaffirms national policy. As recently as May 25, 1987, President Reagan reiterated, in the natural gas context, the national policy established by Congress in the 1975 legislation:[5]

> Today we import only about 5 percent of our petroleum from the gulf. Western Europe and Japan have a much higher dependency. We saw in 1974 and 1979 the disastrous effects which a disruption of gulf oil can have upon the economy of the United States and our principal trading partners. We're working to see that that experience is not repeated. Achieving this requires American military and political strength, the cooperation of our allies, as well as economic strength and independence, especially in matters concerning energy.
>
> And today I'm pleased to sign House Resolution 1941 into law. This legislation eliminates unnecessary restrictions on the use of natural gas. It promotes efficient production and development of our energy resources *by returning fuel choices to the marketplace*.

4. In the final analysis, then, this Court is being urged to review the validity of three "temporary" orders which, as of May 20, 1986 — over fifteen months ago — were, according to Puerto Rico's own stated policy, to lapse "as quickly as possible."

5. The President made these statements upon signing into law H.R. 1941, the amendments to the 1978 Power Plant and Industrial Fuel Use Act.

> I've long believed that our country's natural gas resources *should be free from regulatory burdens that are costly and counter-productive*. This bill abolishes unnecessary restrictions on natural gas and petroleum markets. It also eliminates complicated natural gas pricing procedures which distorted supply and demand and raised energy prices paid by consumers and industry. Moreover, as natural gas is a clean-burning fuel, restrictions inhibiting its use have not been in the best interests of the environment. Removal of these *and other regulatory obstacles* will benefit our economy, energy security, and environment.
>
> In my recent message to Congress on energy security, I urged several measures to ensure our nation has a strong domestic oil and gas industry and substantial protection against oil supply interruptions. These measures, taken together, will result in increased energy security.
>
> I have on three occasions proposed comprehensive natural gas legislation to the Congress. H.R. 1941, while not encompassing all that I proposed, is a step in the right direction - *a step away from bureaucratic controls and a step toward a freer and efficient marketplace*. However, much remains to be done. *Price decontrol* and mandatory contract carriage are still needed if the great potential of our domestic energy resources is to be achieved and energy costs to consumers lowered. I would urge the Congress to move forward from here and take action on other deregulation proposals which are awaiting their action.
>
> And with that said, I applaud those who have worked so hard to bring it to my desk, and I will now sign the legislation.[6]

6. 23 Weekly Compilation of Presidential Documents 568, May 25, 1987, *reprinted in* U.S. Code Cong. & Ad. News, August 1987, No. 6 (softbound), pp. 282-1 and 282-2 (emphasized).

4. As to the Puerto Rico "body of law" claimed by the United States to have been "invalidated" by TECA, suffice it to state that the trial court, affirmed by TECA, found no specific Puerto Rico statute unconstitutional. To the contrary, both the trial court and TECA left large areas of regulation unaffected. Pet. SA 85-86, 94; Pet. App. 18a.

5. The three "temporary" orders invalidated by the trial court, affirmed by TECA, do not even represent any serious "policy" at all, because said orders do not constitute *bona fide* regulation. Rather than seriously reflecting any policy, what the orders show is an administrative donnybrook. The orders "had no legitimate regulatory purpose," Pet. SA 33, and the administrative "hearings had no meaningful purpose of regulating gross profit margins in the wholesale/retail of gasoline." *Id.* The "temporary" orders:

> ... did not consider the equities of all sectors concerned. They were not related to a legitimate purpose of regulating gross margins of profit. The orders obeyed to a promise by the Executive branch of government to maintain the price of gasoline down irrespective of consequences. We do not have a record of hearings by DACO with conclusions directing the Agency that the regulations under attack were constitutionally-acceptable alternatives, no matter how bizarre. There is no minimum rationality to these orders and there is ample evidence to sustain their arbitrariness and politically-motivated purpose. Pet. SA 66.

The "temporary" orders were also devoid of factual support. Petitioners were unable to prove at trial that local gasoline prices had not declined as expected, Pet. SA 19-20, or that respondents reaped excessive profits, Pet. SA 25 n. 9, 36, 43 n. 17, 49 and 49 n. 20. To the contrary, the trial court found reductions of wholesale gasoline prices by various respondents as a result of decreases in crude oil prices. Pet. SA 38, 43. The trial court also found market conditions during the first quarter of 1986 to be "abnormal." Pet. SA 43. As to respondents' conduct, "(n)othing extraordinary occurred during January-March 1986." Pet. SA 25 n. 9. Petitioners' evidence was just

"soft data," Pet. SA 31, and not "hard evidence," Pet. SA 36. The trial court found the market in Puerto Rico to be "fiercely competitive," Pet. SA 27 n. 10, and "highly competitive." Pet. SA 37, 50.

Insofar as the United States characterizes the judicial invalidation of the "temporary" orders as an invalidation of "long-standing, important policy" or of a "body of law," respondents very respectfully submit that the United States is far too generous. The "temporary" orders are undeserving of such a characterization.

6. The United States contends that TECA's decision affects Puerto Rico's "considerable sovereignty," where "Congress has explicitly determined that Puerto Rico should have substantial domestic autonomy." Brief, p. 11. But the United States does not mention that in the specific area of regulation involved herein, Congress carved out no special niche for Puerto Rico; to the contrary, Congress included Puerto Rico within the meaning of "United States" and "State" in the pertinent legislation. 15 U.S.C. Sec. 752(7) and 42 U.S.C. Sec. 6202(4).

7. The United States argues that, given TECA's special, nationwide jurisdiction, its decision "appears to bar state regulation in a significant area." Brief, pp. 10-11. The United States does not go as far as stating that state regulation is *in fact* barred; this only "appears" to be the case.

The United States presents nothing more than a mere hypothetical. Other than the three "temporary" orders at issue herein, no state statutes or regulations are barred by TECA's decision simply because they are nowhere to be found, or so it "appears." The trial court stated that its "research ... revealed ... no state has enacted price controls, laws or regulations" in the context of post-September 30, 1981 state action and other than for energy emergency situations. Pet. SA 77.

Several states have appeared herein as *amici* in support of the petition, but not one of them has pointed to a specific statute or regulation barred by TECA's decision. The kinds of statutes three of the *amici* (New York, New Jersey and Connecticut) have pointed out were expressly left intact both by the trial court, Pet. SA 85-86, and by TECA, Pet. App. 18a. The United States, who denies the existence of "a lingering preemptive grin

without a statutory cat,"[7] forgets that there cannot be a "preemptive grin," "lingering" or otherwise, when there is nothing there to preempt in the first place (other than the three "temporary" orders at issue herein).

The efforts of the United States and the *amici* notwithstanding, the three "temporary" orders at issue herein stand alone. An isolated instance of "temporary," so-called regulation is not worthy of this Court's review.

CONCLUSION

The United States has urged this Court to review a case which is not worthy of its review. Certiorari should be denied.

Respectfully submitted in San Juan, Puerto Rico, on September 4, 1987.

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7. Brief, p. 14.

Igor Domínguez
WILLIAM ESTRELLA
LAW OFFICES
Counsel for Texaco
Puerto Rico, Inc.
P.O. Box S-4826
San Juan, Puerto Rico 00905
(809) 721-7481

Rafael Pérez-Bachs*
Néstor M. Méndez-Gómez
Maggie Correa-Avilés
Ana Matilde Nin
Arturo J. García-Solá
McCONNELL VALDES KELLEY
SIFRE GRIGGS & RUIZ-SURIA
Counsel for The Shell Company
(Puerto Rico) Limited,
Mobil Oil Caribe, Inc. and
Phillips Puerto Rico Core, Inc.
G.P.O. Box 4225
San Juan, Puerto Rico 00936
(809) 759-9270

Alvaro R. Calderón, Jr.
Counsel for Isla Petroleum
Corp. and Gasolinas de
Puerto Rico Corp.
P.O. Box 2219
Hato Rey, Puerto Rico 00919
(809) 753-5050

Carlos F. López
Celso E. López
Counsel for Cía. Petrolera
Caribe, Inc.
P.O. Box 8852
Santurce, Puerto Rico 00910
(809) 721-5037

*Counsel of Record

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In the Supreme Court of the United States

OCTOBER TERM, 1987

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, ET AL., PETITIONERS

v.

ISLA PETROLEUM CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LOUIS R. COHEN
Deputy Solicitor General

JAMES M. SPEARS
Deputy Assistant Attorney General

JOHN HARRISON
Assistant to the Solicitor General

JOHN F. CORDES
BRUCE G. FORREST
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

26 pp

QUESTION PRESENTED

Whether the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*, as amended by the Energy Policy and Conservation Act (Pub. L. No. 94-163, 89 Stat. 871), prohibits the Commonwealth of Puerto Rico from regulating the prices charged by gasoline wholesalers.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1406

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, ET AL., PETITIONERS

v.

ISLA PETROLEUM CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. In October 1973 war in the Middle East and a resulting embargo on oil exports to the United States caused severe disruptions in the international trade in crude oil and petroleum products (see Pet. App. 8a). In response, Congress enacted the Emer-

gency Petroleum Allocation Act of 1973 (the EPAA), Pub. L. No. 93-159, 87 Stat. 627, 15 U.S.C. 751 *et seq.*, which provided, subject to specified exceptions, for allocation and price regulation of "all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States" (§ 4(a), codified as amended, 15 U.S.C. 753(a)). Section 4 of the EPAA directed the President to "promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation" (*ibid.*).

The EPAA had explicit preemptive effect, but only to the extent of conflict between federal and state regulation. It provided that "[t]he regulation under section 4 and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order" (§ 6(b), 87 Stat. 633, 15 U.S.C. 755(b)).

Section 4(g) of the EPAA originally provided that "[t]he authority [of the President] to promulgate and amend the regulation and to issue any order under this section, and to enforce under section 5 such regulation and any such order, expires at midnight February 28, 1975, but such expiration shall not affect any action or pending proceedings, civil or criminal, not finally determined on such date, nor any action or proceeding based upon any act committed prior to midnight February 28, 1975" (§ 4(g), 87 Stat. 632, 15 U.S.C. (Supp. IV 1974) 753(g)). Congress amended the EPAA three times to extend the President's authority; the last change set the expiration date at December 15, 1975 (Act of Nov. 14, 1975, Pub. L. No. 94-133, § 1, 89 Stat. 694).

On December 22, 1975, Congress enacted the Energy Policy and Conservation Act (the EPCA), Pub. L. No. 94-163, 89 Stat. 871. The EPCA retroactively amended the EPAA, repealing Section 4(g) and, instead of terminating all federal controls at the same time, mandated a gradual phase-out of the President's regulatory authority (§§ 401-403, 89 Stat. 941-948). It provided that at the end of a 40-month phase-out period the President's regulatory authority would become "discretionary rather than mandatory" and further provided that "[t]he authority to promulgate and amend any regulation or to issue any order under this Act shall expire at midnight September 30, 1981, but such expiration shall not affect any action or pending proceedings, administrative, civil, or criminal, not finally determined on such date, nor any administrative, civil, or criminal action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration" (§ 461, 89 Stat. 955 (§ 18 of the EPAA, 15 U.S.C. 760g, as amended)). Pursuant to the discretionary authority conferred by this section, President Reagan terminated all petroleum price and allocation controls on January 28, 1981 (Exec. Order No. 12,287, 3 C.F.R. 124 (1982)).

2. Since 1942, Puerto Rico has provided for the regulation of prices of and profit margins on staple commodities sold in its territory (Pet. App. 3a). In 1973, regulatory authority was vested by statute in petitioner Puerto Rico Department of Consumer Affairs (DACO) (*ibid.*). DACO and its predecessors

"regulated the price of gasoline and other petroleum products from 1953 to 1973. * * * Upon the enactment of [the EPAA], DACO suspended its regulatory authority over gasoline prices and profit margins" (*ibid.*)

In 1975, at a time when the EPAA was scheduled to expire on August 31, 1975, "DACO issued Price Regulation 45 which would restore its price controls [on petroleum products] upon expiration of the EPAA" (Pet. App. 3a). Price Regulation 45, as amended, provided that the Secretary of DACO could issue orders fixing prices and profit margins for gasoline, kerosene and diesel oil sold "at all levels of distribution" within Puerto Rico (Pet. App. 36a, 37a-38a) and required that, when no such orders were in effect, 15 days' notice be given to the Secretary before any seller raised its price for a regulated item (*id.* at 37a). When the EPCA was adopted, DACO amended Price Regulation 45 to provide that "the price regulation authority would not become effective until 'the Federal Price Controls are lifted over the articles here regulated * * *'" (Pet. App. 3a (quoting Price Regulation 45 as amended)). Accordingly, Price Regulation 45 became effective by its terms on January 29, 1981.

On March 18, 1986, apparently in response to falling world oil prices, the Puerto Rico legislature imposed on oil refiners an excise tax that varied with the world price of oil (Law No. 5 of March 18, 1986, P.R. Laws; see Pet. App. 49a). On March 26, 1986, the Secretary of DACO issued an order reminding the public of his authority under Price Regulation 45 and reiterating the 15-day notice requirement (Pet. App. 42a-45a). On April 23, 1986, the Secretary of DACO issued two orders. One authorized oil refiners to pass the cost of the excise tax on to gasoline wholesalers but forbade wholesalers from passing the increase on to retailers (Pet. Supp. App. SA25), while the other capped wholesale gasoline prices at their March 31, 1986, levels (Pet. App. 47a). On May 20, 1986, the Secretary issued a third order which "lifted the freeze on gasoline prices. It divided wholesalers into two groups—minor (Group 1) and major (Group 2). Group 1 wholesalers would be allowed to sell to retailers at a profit of 8.6 cents per gallon, and Group 2 at a profit of 3.6 cents per gallon" (Pet. App. 3a; see *id.* at 49a-57a (May 20 Order)).

3. In May 1986 (before the Secretary of DACO's order of May 20), respondents filed eight actions in the United States District Court for the District of Puerto Rico challenging DACO's orders, which they claimed conflicted with federal law and with various constitutional provisions. The eight actions were consolidated, and on June 4, 1986, the district court entered judgment for respondents (Pet. Supp. App. SA86-SA87), finding "that the price/regulatory orders of March 26, April 23, and May 20, 1986, [were] unconstitutional based on the substantive due process and preemption considerations discussed herein" (*id.* at SA86). Respondents appealed the preemption decision to the Temporary Emergency Court of Appeals (TECA) and the substantive due process decision to the First Circuit.[1]

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[1] TECA originated in the Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 2, 85 Stat. 749 (the ESAA), which amended the Economic Stabilization Act of 1970, Pub. L. No. 91-379, Tit. II, 84 Stat. 799 (the ESA) to specify implementing procedures for the President's temporary authority under the ESA to control wages, prices and rents throughout the economy. Under the ESA as amended by the ESAA, TECA was to hear appeals "in cases and controversies arising under [the ESA controls] or under regulations or orders issued thereunder" (Pub. L. No. 92-210, § 2,

A divided panel of TECA affirmed. The majority began by noting that "the primary task in deciding a pre-emption issue is to determine Congressional intent" (Pet. App. 6a) and admitted that the case was "somewhat unusual in that the claimed pre-emption results from the absence rather than the presence of federal authority" (*id.* at 7a). The court of appeals believed, however, that this Court had held "that pre-emption can occur in these circumstances" (*ibid.*).

After a review of the history of federal regulation of oil prices (Pet. App. 7a-10a), the court of appeals turned to this Court's decision in *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245 (1982). *Tully* involved a New York statute that "established a two percent tax on the gross receipts of oil companies limited to their revenues derived from their activities within the State" (455 U.S. at 245 (citation omitted)). "Desiring that the tax actually be borne by the oil com-

85 Stat. 749 (§ 211(b)(2) of the ESA as amended)). When the EPAA was enacted the President's authority to impose mandatory controls had not expired and TECA was still in existence. Section 5(a)(1) of the EPAA extended TECA's jurisdiction to EPAA litigation, providing that cases and controversies under the EPAA allocation regulation were to be treated as if they arose under the ESA (Pub. L. No. 93-159, § 5(a)(1), 87 Stat. 633, 15 U.S.C. 754(a)(1)). The courts of appeals have held that TECA has exclusive jurisdiction to decide preemption issues under the EPAA (Pet. App. 4a-6a; see, *e.g.*, *Mobil Oil Corp.* v. *Tully*, 639 F.2d 912, 915-916 (2d Cir.), cert. denied, 452 U.S. 967 (1981)).

On January 23, 1987, the First Circuit stayed its proceedings pending the issuance of TECA's mandate in this case (see *Tenneco Oil Co.* v. *Department of Consumer Affairs*, No. 86-1590 (1st Cir.)). Pursuant to a stay granted by TECA on February 6, 1987, TECA's mandate is stayed until this Court rules on the petition (see Rule 41(b), Fed. R. App. P.). This brief does not discuss any possible ground of objection to Puerto Rico's regulatory scheme other than preemption.

panies, its intended objects, rather than by consumers, the New York Legislature prohibited the companies from passing on the cost of the tax in the price of their products sold in New York" (*id.* at 245-246). The oil company plaintiffs in *Tully* challenged the New York tax on preemption grounds, "claiming that it was in conflict with and therefore pre-empted by federal price control authority under [the EPAA]" (*id.* at 246). The district court agreed with the plaintiffs and invalidated the tax, and TECA affirmed (*Mobil Oil Corp.* v. *Tully*, 499 F. Supp. 888 (N.D.N.Y. 1980), aff'd, 653 F. 2d 497 (Temp. Emer. Ct. App. 1981), vacated and remanded, 455 U.S. 245 (1982)).

This Court decided *Tully* after the President's regulatory authority had expired pursuant to Section 18 of the EPAA. The Court quoted TECA's explanation of the effect of that expiration: "[TECA] noted that the federal statute would expire by its own terms in September 1981, and that expiration of the Act 'will signal the end of federal concern in the area'" (455 U.S. at 246 (quoting 653 F.2d at 502)). The Court said that "[t]he expiration date for the federal statute has come and gone; the only barrier to the enforcement of the antipassthrough provision no longer exists. However, the injunction entered by the District Court and affirmed by TECA did not terminate on October 1, 1981" (455 U.S. at 247). Accordingly, the Court found that "in its present form the declaration of the invalidity of the antipassthrough provision and the accompanying injunction against enforcing it have no current validity and must be set aside" (*ibid.*). Recognizing, however, that the lower courts in *Tully* had adjudicated a number of issues relating to the effects of the New York law during the period before the expiration of federal controls,

the Court remanded the case to TECA to decide "what effect, if any, the expiration of federal price authority [had] on these collateral matters" (*id.* at 248 (footnote omitted)).[2]

After describing *Tully*, TECA in this case decided that "[a]lthough *Tully* appears to answer the question we now face, the context of its appeal to the Supreme Court and the Supreme Court's recent decision in *Transcontinental* convince us that *Tully* is not an appropriate guide for our decision" (Pet. App. 11a). TECA was referring to *Transcontinental Gas Pipe Line* v. *State Oil & Gas Bd.*, No. 84-1076 (Jan. 22, 1986) (*Transco*), in which this Court considered whether the Natural Gas Act, ch. 556, 52 Stat. 821, 15 U.S.C. 717 *et seq.* (the NGA) continued to preempt a state "ratable-take" rule after it was amended by the Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3351, 15 U.S.C. 3301 *et seq.* (the NGPA). The NGPA removed FERC's authority to regulate the price of certain high-cost natural gas. The Court found that the NGA as amended nevertheless continued to preempt the state rule. TECA here read *Transco* as requiring it to "determine whether by removing federal price control authority Congress intended to allow the states to step in and assume price control authority over gasoline" (Pet. App. 12a). The TECA majority answered that question in the negative, on the basis of its reading of the legislative history of the EPCA. Explaining that the EPCA provided for "a carefully controlled transition to an unregulated market" (Pet. App. 13a), the majority found it "inconceivable that Congress would implement such an extensive and carefully orchestrated termination of federal intervention with the intention that the states step in to regulate" (*ibid.*).

[2] On remand, TECA remanded the case to the district court for further proceedings (*Mobil Oil Corp.* v. *Tully*, 689 F.2d 186, 187 (1982)). The suit was settled before the district court entered any further orders (No. 80-CV-543 (N.D.N.Y.)).

Judge Christensen dissented. He emphasized the temporary, emergency nature of oil price controls: "[t]he very names of the Act and of this Court underscore their transitory nature and purpose" (Pet. App. 20a). He criticized the majority's reading of *Tully* and *Transco* (*id.* at 23a-25a) and discounted the majority's concern that state regulation might "frustrate Congress' goal of allowing market forces to regulate the supply and price of petroleum products," noting that "[t]here are already constitutional limitations on the exercise of [the States'] police power * * * and Congress, of course, has the power to deal with any concern of this nature in light of the Supremacy Clause" (*id.* at 26a). He added that under the decision below TECA would have to continue deciding preemption cases "long after adjudications of the validity and effect of the regulations and programs under ESA and the EPAA have been fully completed" (*ibid.*).

DISCUSSION

1. This case merits review for two reasons. First, contrary to *Tully* and based on an erroneous reading of *Transco*, TECA has either found preemption on the basis of a supposed congressional intention that is not embodied in any federal statute, or interpreted a statute that purports only to terminate the President's authority to impose certain federal controls on a field of activity as preempting state and territorial regulation as well; either way, this would be a novel, important, and troubling extension of preemption doctrine. Second, TECA's decision invalidated an im-

portant and longstanding policy of the Commonwealth of Puerto Rico.

a. In *Tully*, this Court said that since the expiration date of the EPAA had come and gone, "the only barrier to the enforcement of [inconsistent state legislation] no longer exists" (455 U.S. at 247). In the present case, TECA recognized (Pet. App. 11a) that its decision was contrary to that statement in *Tully* but held that the *Tully* discussion was probably dictum and was in any event implicitly rejected in *Transco* (*ibid.*). But the *Tully* statement was not dictum: the Court there vacated TECA's judgment because the district court's injunction extended beyond the EPAA's expiration date, after which the EPAA no longer provided a basis for barring state regulation (455 U.S. at 246).[3] And *Transco* did not (sub silentio) overrule or limit *Tully*: the express basis of preemption in *Transco* was the continuing existence of a "comprehensive federal regulatory scheme" (*Transco*, slip op. 12), one feature of which was reliance on the market in certain respects, which the state regulation in question "directly undermine[d]" (*ibid.*).

TECA held that Congress's decision to bring federal regulation of oil prices to an end would preempt state regulation unless TECA were able to find that Congress intended "'an invitation to the States to impose additional regulations'" (Pet. App. 14a (quoting *Transco*, slip op. 13)), a finding TECA was unable to make. In the absence of affirmative federal legislation to the contrary, TECA's decision appears to bar state regulation in a significant area. Because

[3] Although we believe the *Tully* statement was necessary to the Court's disposition of the case, the case had not been briefed on the merits and the effect of the expiration of federal regulatory authority does not appear to have been raised explicitly.

of TECA's special jurisdiction, this bar is nationwide and cannot be reconsidered by any other court of appeals. Moreover, TECA's theory—finding preemption either in a supposed congressional intention not embodied in any statute or in the mere decision to terminate federal regulation—enlarges preemption doctrine in a way that warrants this Court's review.

b. The decision below strikes at a long-standing and important policy of the Commonwealth of Puerto Rico (see Pet. App. 3a-4a). Congress has explicitly determined that Puerto Rico should have substantial domestic autonomy (see Act of July 3, 1950, ch. 446, 64 Stat. 319 (endorsing "right of self-government of the people of Puerto Rico")).[4] And if Puerto Rico were a State it would have an appeal as of right from TECA's decision under 28 U.S.C. 1254(2). Although that provision does not apply to Puerto Rico (*Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970)), it is appropriate for this Court to take into account, in exercising its discretion to decide whether to issue a writ of certiorari, the fact that the decision below invalidated a body of law of great importance to a territory that enjoys considerable sovereignty (see, *e.g.*, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) (holding Puerto

[4] Congress's power to displace local Puerto Rican law does not derive solely from the Supremacy Clause. Article IV, Section 3, gives Congress the power to "make all needful Rules and Regulations respecting the territory * * * belonging to the United States." But the question in this case—whether Congress has legislated in a way that preempts Puerto Rican regulation—would be no different if a State rather than Puerto Rico were involved: preemption is a question of congressional intent, and no one has suggested that Congress had different intentions with respect to Puerto Rico than with respect to the States.

Rico to be a State for purposes of three-judge district court statute)). Cf. *Stainback* v. *Mo Hock Ke Lok Po*, 336 U.S. 368, 377 (1949) (Territory of Hawaii) ("great respect is to be paid to the enactments of a territorial legislature")).

2. On the merits, TECA's decision should be reversed. First, although TECA was correct that "the primary task in deciding a preemption issue is to determine Congressional intent" (Pet. App. 6a), that intent must be embodied in a federal statute; to the extent that TECA based its decision merely on its perception of congressional sentiment rather than on any extant provision of federal law, the decision was manifestly erroneous. Second, the only pertinent provisions of federal law are Section 4 of the EPAA, which granted the President a now-expired regulatory authority and whose express preemptive effect terminated with the end of that authority, and Section 18 of the EPAA, added by the EPCA, which provides that the President's regulatory authority expired on September 30, 1981, but says nothing about barring state regulation. To the extent that TECA based its decision on an inferred intent in Section 18 to bar state regulation as well, such an inference was unsupported by the legislative history and improper under this Court's preemption precedents. Finally, TECA's reading of *Transco*, as creating a presumption that a statute terminating federal regulation bars state regulation unless Congress affirmatively "intended to allow the states to step in" (Pet. App. 12a), was an incorrect reading of that decision, which was based on the existence of a continuing "comprehensive federal regulatory scheme" (*Transco*, slip op. 12).

a. It is a "familiar and well-established principle that the Supremacy Clause * * * invalidates state laws that 'interfere with, or are contrary to' federal

law" (*Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712 (1985) (quoting *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)). There is no doubt that Congress could, by enacting otherwise valid legislation, have provided explicitly by statute that states may not regulate gasoline prices as Puerto Rico has done (see, *e.g.*, *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977)), or could have adopted a federal regulatory scheme with which Puerto Rico's law is inconsistent and by which it is therefore implicitly preempted (see, *e.g.*, *Michigan Canners & Freezers Ass'n, Inc.* v. *Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461 (1984)).

Prior to September 30, 1981, the EPAA explicitly preempted state or local laws, but only to the extent that they conflicted with "[t]he regulation under section 4 and any order issued thereunder" (Pub. L. No. 93-159, § 6(b), 87 Stat. 633, 15 U.S.C. 755(b)). The President's authority under Section 4, which was temporary throughout the EPAA's history, was brought to an end by Section 18 of the EPAA, which provided that "[t]he authority to promulgate and amend any regulation or to issue any order under this Act shall expire at midnight September 30, 1981" (Pub. L. No. 94-163, § 461, 89 Stat. 955, 15 U.S.C. 760g). As of October 1, 1981, the President's authority under Section 4 had "expire[d]" and Section 18, which caused the expiration, had been fully executed.

TECA's opinion nowhere states that any *provision* of federal law bars the Puerto Rico regulation at issue. Instead, the opinion speaks (Pet. App. 7a) of the "pre-emption effect of the federal decision to deregulate the gasoline market." To the extent that TECA meant that it would be appropriate to give preemptive effect to the supposed congressional sentiment underlying the decision to withdraw from fed-

eral regulation, in the absence of any extant provision of federal law that could be said to bar state regulation, the decision was clearly wrong. Preemption is, as this Court has said many times, a question of congressional intent (*e.g.*, *California Fed. Savings & Loan Ass'n* v. *Guerra*, No. 85-494 (Jan. 13, 1987), slip op. 7), but that intent must be embodied in a statute. Whatever its intentions, Congress may exercise legislative power only by passing laws (see *INS* v. *Chadha*, 462 U.S. 919, 951-958 (1983)), and it is laws duly enacted, not the intentions of Congress standing alone, that are "the supreme Law of the Land." There cannot be a lingering preemptive grin without a statutory cat.

b. The only pertinent provisions of federal law are Section 4 of the EPAA, which conferred temporary regulatory power on the President, and Section 18 of the EPAA, added by the EPCA, which provides that the authority to promulgate and amend regulations and issue orders "shall expire at midnight September 30, 1981." But Congress dealt expressly with the preemptive effect of Section 4, and it is clear that such effect terminated with the expiration of presidential authority.[5] And nothing in the text of Section 18 purports to bar any form of state regulation. The Court's statement in *Tully*, to the effect that the EPAA's preemptive effect ceased when the President's authority expired, is the obvious and natural reading of Section 18. To the extent that TECA attributed preemptive effect to Section 18, its decision conflicts with *Tully*

[5] Section 6(b) of the EPAA preempted provisions of state and local law that were "in conflict with" the President's regulation under Section 4 or any order issued thereunder (87 Stat. 633). Section 18, by terminating the President's authority, eliminated the possibility of any such conflict and therefore terminated the preemptive effect as well.

and would in any event be erroneous: the legislative history of the EPCA does not support any inference of preemption, and TECA's decision violated the principle that "courts should not lightly infer preemption" (*International Paper Co.* v. *Ouellette*, No. 85-1233 (Jan. 21, 1987), slip op. 9 (footnote omitted)).

Nowhere in the legislative history of the EPCA did any Committee or Member of Congress, to our knowledge, explicitly suggest that there would be continuing preemption of state law after the President's authority under Section 4 expired; the question of continuing preemption was not mentioned. TECA inferred continuing preemption not from any legislative history directly relating to that subject, but from what it understood to be Congress's over-all purpose. TECA found that "DACO's price controls interfere with and obstruct Congress' goal of letting market forces set prices and allocate petroleum products" (Pet. App. 17a).

While there is of course evidence that Congress wanted to gradually terminate the "'comprehensive [federal] regulatory structure'" so as to "'return to an unregulated market,'" see Pet. App. 13a (quoting S. Conf. Rep. 94-516, 94th Cong., 1st Sess. 203 (1975)), that evidence simply does not show an intent, not directly indicated anywhere, to bar state regulation. State regulation may (as illustrated by this case) reflect concerns that are absent at the federal level, and may *not* pose problems that would be posed by uniform nationwide federal regulation, and Congress may be well aware of these differences in a given case (see Pet. App. 26a (Christensen, J., dissenting)).

Moreover, both the role of the States in the federal system and practical considerations bearing on the interpretation of federal statutes suggest the contrary presumption, that Congress does not intend to require state regulatory policy to track federal regulatory policy unless it affirmatively indicates that intention. As Judge Christensen pointed out in dissent below (see Pet. App. 26a), Congress can easily affirmatively prohibit state regulation that it believes would defeat proper federal objectives. It is much more sensible to require it to do so than to presume preemption and require Congress to negate that presumption. That is why this Court has always made "the basic assumption that Congress did not intend to displace state law." *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981) (citing *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Here, the legislative history on which TECA relied does not demonstrate an intent to displace state law; it certainly is not enough to overcome the contrary presumption required by this Court's cases. See, *e.g.*, *California Fed. Savings & Loan Ass'n* v. *Guerra*, slip op. 8; *R.J. Reynolds Tobacco Co.* v. *Durham County*, No. 85-1021 (Dec. 9, 1986), slip op. 9; *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 633-634 (1981) (preemption on basis of general national policy not favored); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963)).

c. The explanation for TECA's decision appears to lie in what it took to be this Court's instructions in *Transco*: "As in *Transcontinental*, we must determine whether by removing federal price control authority Congress intended to allow the states to step in and assume price control authority over gasoline" (Pet. App. 12a). But TECA's reading of *Transco* reflects a fundamental misunderstanding of that case.

In *Transco*, this Court analyzed the congressional purpose underlying, and found preemption on the basis of, a continuing federal regulatory program, not the expiration of regulatory authority. The Court had previously held in *Northern Natural Gas Co.* v. *State Corporation Comm'n*, 372 U.S. 84 (1963), that the Natural Gas Act (NGA) provided a "comprehensive scheme of federal regulation" (*id.* at 91) that preempted a state "ratable-take order." Thereafter, in the Natural Gas Policy Act of 1978 (NGPA) Congress amended the NGA, lifting federal price regulation of certain "high-cost" natural gas (see *Transco*, slip op. 11). The question in *Transco*, which involved a "virtually identical regulation," was "whether Congress, in enacting the NGPA, altered those characteristics of the federal regulatory scheme which provided the basis in *Northern Natural* for a finding of pre-emption" (*Transco*, slip op. 8).

The Court ruled that ratable-take orders continued to be preempted. It noted that the NGPA was "'a comprehensive statute to govern future natural gas regulation,'" (*Transco*, slip op. 11 (quoting *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319, 332 (1983)), and "[did] not constitute a federal retreat from a comprehensive gas policy" (*ibid.*). It then found that the Mississippi ratable-take rule "[ran] afoul of other concerns identified in *Northern Natural*" (*id.* at 13) because it disturbed "the uniformity of the federal scheme" and "would have the effect of increasing the ultimate price to consumers" (*ibid.*), both subjects of concern to ongoing federal regulation. In sum, the Court in *Transco* based its conclusion on its understanding of a "comprehensive federal regulatory scheme" (*id.* at 12).

When the Court said, in *Arkansas Elec. Coop.* v. *Arkansas Public Service Comm'n*, 461 U.S. 375, 384 (1983), cited by TECA at Pet. App. 7a, that " 'a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated,' " it was discussing a field in which Congress had passed comprehensive legislation explicitly allocating regulatory authority between state and federal agencies (*id.* at 378-380). The same was true in *Transco*. A comprehensive federal regulatory scheme within which one area has been deliberately left unregulated obviously may (if that is determined to be Congress's intention) preempt state regulation in that area. The present case is quite different: TECA concluded here that Congress had intended to preempt despite the absence of any continuing federal involvement in the field. *Transco* did not warrant that leap.[6]

The rule TECA derived from *Transco* would reverse the normal presumption regarding preemption. Under TECA's rule, when Congress terminates federal regulation of an area it would be presumed to have forbidden state regulation as well unless there is some affirmative indication to the contrary. This approach is incorrect and rests on a misreading of *Transco*. When Congress wishes to bar state regulation in a field subject to federal regulation, it can easily do so affirmatively. Requiring Congress instead to negate or partially negate preemption in con-

[6] When Congress repeals a federal law that has preemptive effect, or provides that such a law will expire, it can, of course, also provide that state and territorial law will continue to be preempted even after substantive federal control has been lifted. But *Transco* does not authorize a court to presume that a repealing statute has such effect when Congress does not say so.

nection with every enactment, modification, or repeal of a federal regulatory statute, whenever Congress does not wish to require total state conformity, would be impractical, contrary to precedent, and inconsistent with the role of the States in the federal system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LOUIS R. COHEN
Deputy Solicitor General

JAMES M. SPEARS
Deputy Assistant Attorney General

JOHN HARRISON
Assistant to the Solicitor General

JOHN F. CORDES
BRUCE G. FORREST
Attorneys

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BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,
Petitioners,

v.

ISLA PETROLEUM CORPORATION, *et al.*,
Respondents.

On A Petition For A Writ Of Certiorari To The United States Temporary Emergency Court of Appeals

BRIEF OF *AMICI CURIAE* THE STATES OF WISCONSIN, MISSISSIPPI, HAWAII, MICHIGAN, OREGON, MAINE, PENNSYLVANIA, and WEST VIRGINIA IN SUPPORT OF PETITIONERS

DONALD J. HANAWAY
Attorney General of Wisconsin

EDWIN L. PITTMAN
Attorney General of Mississippi

FRANK J. KELLEY
Attorney General of Michigan

JAMES E. TIERNEY
Attorney General of Maine

LEROY S. ZIMMERMAN
Attorney General of Pennsylvania

JAMES F. FLUG*
LEE ELLEN HELFRICH
PAULA DINERSTEIN
Lobel, Novins, Lamont & Flug
1275 K Street, N.W.
Washington, D.C. 20005
(202) 371-6626

WARREN PRICE III
Attorney General of Hawaii

DAVE FROHNMAYER
Attorney General of Oregon

CHARLIE BROWN
Attorney General of West Virginia

Attorneys for Amici Curiae

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTION PRESENTED

May a federal court, consistent with the principles of Federalism, the Supremacy Clause, the Tenth Amendment and the constitutional framework for exercise of the national government's lawmaking powers, ascribe authoritative and binding effect, totally preempting State exercise of its police powers, to inferences of congressional policy due solely to the expiration of a federal statute, despite (a) the absence of a duly enacted law encompassing any policy, and (b) Congress' demonstrable failure to obtain the constitutionally mandated consensus of the House, the Senate and the President to enact a law preempting the States' concurrent authority over matters of economic regulation?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1406

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,
Petitioners,

v.

ISLA PETROLEUM CORPORATION, *et al.*,
Respondents.

On A Petition For A Writ Of Certiorari To The United States Temporary Emergency Court of Appeals

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BRIEF OF *AMICI CURIAE* THE STATES OF WISCONSIN, MISSISSIPPI, HAWAII, MICHIGAN, OREGON, MAINE, PENNSYLVANIA, and WEST VIRGINIA, IN SUPPORT OF PETITIONERS

PRELIMINARY STATEMENT

Pursuant to Sup. Ct. R. 36 of this Court, the States of Wisconsin, Mississippi, Hawaii, Michigan, Oregon, Maine, Pennsylvania, and West Virginia (State *Amici*) respectfully submit this brief as *Amici Curiae* in support of the petition of the Department of Consumer Affairs of the Commonwealth of Puerto Rico and its Secretary, Pedro Ortiz Alvarez in No. 86-1406 for a Writ of Certiorari. In this case, the Temporary Emer-

gency Court of Appeals ("TECA") held that the States were totally preempted from regulating gasoline prices on the theory that Congress' intention, in allowing the Emergency Petroleum Allocation Act of 1973 ("EPAA")[1] *to expire by its own terms*, was to establish a "policy" that such prices be left unregulated and determined by the "open market."

Last term, this Court reaffirmed that an issue of federal abrogation of a State statute is a "grave matter," particularly warranting review. *Maine v. Taylor*, 477 U.S. ___, 106 S.Ct 2440, 2446 (1986). This continuing concern is demonstrated by the sheer number of cases involving preemption that have been and are being addressed this term by the Court. *See, e.g., California Coastal Commission v. Granite Rock Co.*, 55 U.S.L.W. 4366 (U.S. March 24, 1987); *International Paper Co. v. Harmel Ouellette*, 93 L.Ed 2d 613 (1987); *California Federal Savings & Loan Association v. Guerra*, 93 L.Ed 2d 613 (1987); *Fort Halifax Packing Co. v. Coyne*, 510 A.2d 1054 (Me.), *jurisdiction noted*, 93 L.Ed 2d 380 (1986).

This case poses a critical and unique question of preemption through Federal inaction, involving the boundary between the commands of the Supremacy Clause and the protection of the Tenth Amendment. While the Court has in the recent past struggled with this issue,[2] *Amici* believe that never before has there been a clearer case presenting the issue of the constitutional limits necessary for maintenance of our system of dual sovereignty and Federalism.

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[1] 15 U.S.C.A. §§ 750-760g (1976 and Supp. 1986).

[2] *Compare National League of Cities v. Usery*, 426 U.S. 833 (1976), *with Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

In *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), this Court underscored the constitutional significance of the Framers' deliberate division of power among the co-equal branches of the federal government. This case is the *Chadha* of Federalism.

The State *Amici* urge this Court to issue the Writ and reverse the Decision of TECA, entered December 29, 1986, rehearing denied January 30, 1987. Moreover, in view of the Court's decision last month in *California Coastal Commission v. Granite Rock Co. supra*, State *Amici* believe that Petitioner's prior suggestion that the Court consider summary reversal is a compelling one, and join in advocating that course.

STATEMENT OF INTEREST

As each State entered into the Union, it subjected and committed itself to recognize and uphold as supreme authority the "Constitution, *and the Laws of the United States made in Pursuance thereof*; and all Treaties made, or which shall be made, under the Authority of the United States. . . ." U.S. Const. art. VI, cl. 2 (emphasis supplied). The States, however, did not relinquish all their powers as governments, or as integral participants in the federal system. Rather, they retained the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States. . . ." U.S. Const. amend. X.

The State *Amici* submit this brief to express their view that the present case raises serious and unique issues regarding the relative powers of the State and Federal governments in terms of the interface between the Supremacy Clause and the Tenth Amendment. The interests of the State *Amici*, as members

of the Union, as sovereign States and as governing bodies, in resolution of these issues are clear and direct, as are their concerns with the ramifications of the TECA decision, if allowed to stand, on the nature of States' reserved power to govern. The State *Amici* submit that the issues raised are of such far reaching significance that they should be decided by this Court.

STATEMENT OF THE CASE

The State *Amici* adopt by reference the "Statement of the Case" set forth on pages 3 through 8 of the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

Summary of the Argument

The decision of TECA in *Isla Petroleum Corp. v. Puerto Rico Department of Consumer Affairs*, No. 1-16, slip op. (TECA December 29, 1986); Petition for Certiorari, Appendix A,[3] if allowed to stand, will seriously erode traditional notions of Federalism, and the States' role as sovereign governments and integral participants in the federal system. By holding that State laws and regulations can be preempted by "policy" statements inferred from congressional inaction, the TECA decision would legitimize an extension of national power over State action far beyond that ever recognized by this Court. The decision, in effect, authorizes the federal government to dictate the boundaries of State exercise of police power, without the necessity of abiding by the political and structural limits outlined in the Constitution, i.e., the mandatory prerequisites to valid exercise of the federal government's delegated authority. These structural limits were designed by the Framers as a means to protect against improvident intrusions on the rights and powers reserved to the States and the people, and thus as a means to preserve true Federalism. A court cannot, consistent with the Constitution, give authoritative effect to federal actions not formulated through the constitutionally mandated processes. Such a result would force the federal courts to insinuate themselves into the legislative function of determining the substantive merits and need for economic regulation in a manner that this Court long ago found inappropriate.

[3] Page references to the TECA decision will be made to the Petition for Certiorari, Appendix A.

Argument

The TECA Decision Erodes Traditional Principles Of Federalism, Adversely Affecting The Delicate Balance Of The Constitutional System Of Dual Sovereignty

Although the Constitution does not affirmatively detail the role of the States, its structure indicates the important role of Federalism. When the Constitution was enacted the States were already in existence. Thus, the Constitution presupposes a system of dual sovereignty. *See generally*, L. Tribe, *American Constitutional Law* Sec. 5-20 at 300-301 (1978); Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954). In accepting the need for and desirability of a national sovereign, the States unquestionably ceded many of their previously held powers to that government. *Atlantic Coast Line Railroad Co. v. Brotherhood of Lo-*

comotive Engineers, 398 U.S. 281, 285 (1970); *Parden v. Terminal Railway*, 377 U.S. 184, 190 (1964). Under the Constitution, the Congress was delegated plenary authority over certain subjects that the Framers believed might need addressing on a national scale.

Yet plenary authority does not mean exclusive or absolute authority. In fact, the Constitution explicitly details those subjects that are within the exclusive province of the national government. Thus, for example, Article 1, Section 10, outlines in detail those subjects in which "no State shall" interfere. U.S. Const. art. I, sec. 10. But it has long been recognized by this Court that the States share concurrent authority, by virtue of their police power, over economic regulation of commerce. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851). *See also, Munn v. Illinois*, 94 U.S. 113 (1876).

The Court has been sensitive to the inherent tensions associated with a system of dual sovereignty. *Cf., Younger v. Harris*, 401 U.S. 37 (1971); *Southern Railway Co. v. Reid*, 222 U.S. 424 (1911). In the specific instance of the doctrine of preemption, it has demanded clear proof of congressional intent to exercise the full extent of delegated powers before State action is held to be totally precluded. "Pre-emption of state law by a federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.' " *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) quoting, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). *See also, Hillsborough County v. Automated Medical Labora-*

tories, Inc., 471 U.S. 707, 715 (1985) (State police power not to be federally nullified absent "clear and manifest" legislative direction). Even then, the Court has held that the effect of federal exercise of its powers is not a permanent foreclosure of the States' lawmaking authority. "If the right of the states to pass a . . . law is not taken away by the mere grant of . . . power to Congress, it cannot be extinguished; *it can only be suspended, by the enactment of a general . . . law.*" *Sturges v. Crowninshield*, 4 Wheat. 122, 196 (1819) (emphasis supplied).

TECA recognized these propositions, but in applying them concluded that in allowing the EPAA to expire, Congress intended that no regulation of oil pricing should be undertaken on the federal or state level. In doing so, it apparently relied on language in the Court's opinion in *Transcontinental Gas Pipeline Corp. v. State Oil and Gas Board*, 474 U.S. ___, 106 S.Ct 709, 717 (1986), stating that a "federal decision to forgo regulation in a given area may imply an authoritative determination that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate."

As Puerto Rico's Petition for Certiorari clearly sets out, the Court's statement in *Transcontinental Gas Pipeline* was made in the context of review of a comprehensive federal regulatory program on natural gas pricing. Petition for Certiorari at pp. 20-24. The Court has never relied on inference of federal "policy" to support preemption of State authority, in the absence of a federal statute exhibiting a clear intent to preempt State laws. *Transcontinental Gas Pipeline*, thus, should not be construed—as the TECA decision did—to overrule the Court's decision in *Tully v. Mobil*

Oil Corp., 455 U.S. 245 (1982), which held that preemption of State regulation under the EPAA did not survive beyond that Act's expiration date. In fact, because *Transcontinental Gas Pipeline* enters the "grave" area of preemption of State statutes, it should be given a narrow, rather than broad reading, outside its particular facts.

TECA's novel extension of the Court's established preemption doctrine alone serves as a basis for review of that decision under Sup. Ct. R. 17.1(c), as a decision of a federal question "in a way in conflict with applicable decisions of this Court." Moreover, unlike the many decisions that TECA has rendered as the appellate court with exclusive jurisdiction under the EPAA and intimate familiarity "with the intricacies of federal regulations" (*Tully v. Mobil Oil Co.*, 455 U.S. 245, 248 (1982)), this case involves straightforward application of this Court's own decisions on preemption, and the authoritative effect, *under the Constitution*, to be given to Congressional inaction. Lurking within the TECA decision is a broad, unstated effect, with potential impact far beyond the scope of the EPAA, that demands that the Court review and reverse.

As noted above, Congress' authority over matters of commerce is not exclusive. Recognition of this by the Court has aided the preservation of Federalism. Nor is that Congressional authority unbridled. Before legislative intentions can be found to preempt State action, Congress must affirmatively exercise its constitutionally delegated power through validly enacted legislation.

In drafting the Constitution, the Framers were consciously concerned with developing a concept of a

national government *limited* in nature. *Cf., United States v. Gillock*, 445 U.S. 360, 370 (1980) ("It requires no citation of authority for the proposition that the Federal Government has limited powers with respect to the states. . . ."). These limits are defined not only by explicit enumeration of the powers of Congress, but also by the mandated structural process for exercise of those powers. The limited nature of national power is part of the "compact" made with the States and the people when they agreed to cede certain preexisting powers and functions to a national government. If Congress exceeds the limits by failing to act within the consitutional structure, it has violated the very nature of that "compact." Such a federal action is void and cannot supercede valid State action. This lesson is certainly clear from the Court's decision in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

In *Chadha*, the Court carefully detailed the structural and procedural process that must be followed by the national government before its actions can be deemed to have constitutional force. It recognized that the constitutionally mandated process was more than a procedural nicety that can be casually sidestepped through institution of more politically convenient means of lawmaking. *Id.* at 945. Rather the Court held that the carefully circumscribed constitutionally mandated procedure, while burdensome, was designed "to protect the people from the improvident exercise of power by mandating certain prescribed steps." *Id.* at 957. While factually *Chadha* involved solely the relationship between the co-equal branches of the federal government, the Court explicitly recognized who

and what separation of powers was designed to protect:

> The records of the Convention and debates in the States preceding ratification underscore the common desire to define and limit the exercise of the newly created federal powers affecting *the states and the people*. There is unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.

Id. at 959 (emphasis supplied).

Substantively, this reference means more than mere paternalistic concern with protecting the States and the people against the potential enactment of ill-conceived laws. Rather, it is a recognition of the role that separation of powers, and checks and balances, play in preserving the political rights of participation in government reserved to the people and the States. It is the essence of the concept of a *limited* national government.

In terms of the States, the lessons of *Chadha* must be viewed as a recognition that these structural limits were designed to preserve and maintain the States' role as sovereign governments, and as integral parts of the federal system. ". . .[T]he governmental power distribution clauses of the Constitution gain their largest meaning as an instrument for the protection of the states. Those clauses, as is well known, have served far more to qualify or stop intrusive legislative measures in the Congress than to invalidate enacted legislation in the Supreme Court." Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum.L.Rev. 543, 552 (1954). The appropriate juxtaposition of the commands of the Supremacy Clause and the protection of the Tenth Amendment should be viewed in light of structural limitations on Congress' power outlined in *Chadha*.

In fact, the Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), recognized that it is these limits that form the basis of protection extended to the States under the Tenth Amendment. While in *Garcia*, the Court focused on the States' "role in the selection both of the Executive and the Legislative Branches of the Federal Government" (*id.* at 551), it underscored "that the fundamental limitation that the constitutional theme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result." *Id.* at 554 (emphasis supplied). "The political process ensures that laws that unduly burden the States will not be promulgated." *Id.* at 556. This protection can be achieved only if the process is allowed to work, and not undercut by legislative shortcuts, as in *Chadha*, or court interpretations, as in this case.

The Court's most recent decision in this field confirms that the process required in order to preempt the exercise of the States' police power is the affirmative enactment of legislation by Congress. In *California Coastal Commission v. Granite Rock Co.*, 55 U.S.L.W. 4366, 4368 (U.S. March 24, 1987), in holding that the "Property Clause itself does not automatically conflict with all state regulation of federal land," the Court emphasized this requirement in quoting *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976):

> Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress retains power *to enact legislation* respecting those lands pursuant to the Property Clause. *And when Congress so acts*, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.

(Emphasis in original).

The role of the federal judiciary is to assure that the constitutional design is accomplished. The courts, consistent with this responsibility, cannot give or ascribe to Congress power that it does not have under the Constitution. This is what the TECA decision, however, would do. It holds that Congress' decision to allow the EPAA to expire—Congress' refraining from legislating—exhibits a "negative" policy binding on the States. In so holding, TECA did not find, in the words of *California Coastal Commission, supra* at 4368, that "Congress has enacted legislation . . . that would preempt" otherwise valid State action by affirmatively establishing an "open market" policy for all oil industry pricing practices. Indeed, there had been attempts, in bills to provide the President with standby authority after the expiration of EPAA, to explicitly preempt state laws and regulations. One was vetoed by the President,[4] and the other was not even

[4] In March 1982, Congress passed the Standby Petroleum Allocation Act ("SPAA"), S. 1503, 97th Cong., 2d Sess., 128 Cong. Rec. H409 (daily ed. Feb. 22, 1982). That Act contained a preemption provision. *See* 128 Cong. Rec. at H411. On March 22, President Reagan vetoed the bill. 128 Cong. Rec. S2513 (daily ed. March 22, 1982). *See also*, 128 Cong. Rec. S1367 (daily ed. March 2, 1982) (U.S. Department of Energy objects to SPAA as "in direct conflict with the President's Federalism program").

reported by Committee.[5] Rather than exhibiting the establishment of a preemptive federal policy, this history demonstrates the failure of the national government to take the requisite steps to establish by law the legislative/executive consensus necessary to trigger operation of the Supremacy Clause over State action.

The national government might at some future time legislate on the basis of a consensus on the scope of appropriate regulation of the oil industry and affirmatively extend its plenary authority on a national scale, but it has not done so yet. Congress, in fact, has often reacted by legislation when it perceives a federal interest being adversely affected by State laws. *E.g., Aloha Airlines v. Director of Taxation*, 464 U.S. 7 9-10 (1983). Such a give and take is as important a part of our federal system as the separation of powers among the co-equal branches of the national government. It is the equivalent of another layer in the checks and balances inherent in a federal

[5] S. 1678, 98th Cong., 1st Sess., 129 Cong Rec. S10,762 (daily ed. July 25, 1983). Congress did enact the Energy Emergency Preparedness Act of 1982, 42 U.S.C.A. §§ 6281-82 (1983), which required the Attorney General to advise Congress as to the Executive's existing authority over and plans as to energy emergencies. In addition, that Act provides that "[n]o State law or State program in effect on August 3, 1982, or which may become effective thereafter, shall be construed to be superceded by any provision of this part." 42 U.S.C.A. § 6282(c)(2). While TECA reviewed the post-EPAA expiration actions of Congress as relevant to legislative intent, it specifically stated that "[w]e cannot look to these actions as a basis for preemption." Petition for Certiorari, Appendix A at 14a. TECA's holding that preemption was required, thus, must be solely viewed as based upon the expiration of the EPAA.

system, which presupposes and reserves rights of political participation to the States and the people.

The exigencies of a truly federal system demand recognition of the preexisting State authority to regulate commerce and other subjects of concurrent authority. The States have often served to identify problems, first appearing on a local level, and potential solutions to those problems that can serve as prototypes or springboards for national government action, if and when a federal concern in the issue is identified and affirmatively addressed by Congress. *Cf., Garcia v. San Antonio Metropolitan Transit Authority, supra* 469 U.S. at 546, quoting *New State Ice Co. v. Liebman*, 285 U.S. 262 (1932) (Brandeis, J., dissenting) (importance of experimentation in government); *Allen v. Illinois*, 478 U.S. ___, 102 S.Ct 1757, 92 L.Ed 2d 296, 308 (1986) ("[t]he essence of federalism is that the states must be free to develop a variety of solutions and not be forced into a common, uniform mold"); *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 522 (1959) ("[i]f there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective.").

As has been recognized, the national government is a reactive body, whose laws are "interstitial" in character, operating on the presumption of and in conjunction with the States as sovereign lawmakers, more closely in tune with the needs of their citizens. Hart and Wechsler, *The Federal Court and the Federal System* at 470-471 (2d ed. 1973). "Congress acts . . . against the background of the total *corpus juris* of the states in much the same way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation." *Id.* at 471.

In the absence of duly enacted statutes exhibiting a clear intention to preempt, the States' freedom to act is confined only by the requirements of the Constitution—in the instant case the jurisprudence of the so-called "dormant" Commerce Clause, a doctrine no party has asserted to be applicable herein. *Compare Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). The established and accepted restrictions on State power have proven sufficient to negate the fears of economic localism detrimental to the flow of commerce between the States, while at the same time maintaining the States' valuable and integral role as governors. The TECA decision restricts State power even further by expanding the limits and strengthening the ultimate power of the national government, thereby upsetting the delicate balance that for 200 years this Court has striven and struggled to maintain under the rubric of Federalism.

To allow the TECA decision to stand will be tantamount to authorizing the concentration of the lawmaking function in the hands of a single branch of the federal government, wholly out of keeping with concepts of separation of powers and Federalism. The logical conclusion of the TECA decision would be to allow Congress—without enacting laws—to issue statements of "national policy," binding despite the fact that they have not undergone the rigorous system of checks and balances that was designed to prevent the unrestrained and unaccountable aggrandizement of federal power, at the expense of the people and the States.

Moreover, the TECA decision places the judiciary in an untenable "legislative" role. With regard to the oil industry in particular, many States have already established powers and laws regulating and taxing various aspects of the conduct of that business within their borders. *See e.g., Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982); O'Donnell and Glassman, *Constitutional Constraints on State Efforts to Control Oil During Emergencies*, 5 Energy L.J. 77 (1984) (reviewing State energy emergency plans). The federal courts will be forced to scrutinize State laws under the vague standard of whether they adversely affect or conflict with Congress' not-enacted "intention" that oil prices be determined entirely by the "open market." Such an inquiry is substantially different from those cases in which the courts have had the benefit of a statute establishing a specific regulatory program, buttressed by explicit legislative history as to its operation, to aid them in determining the extent of federal preemption. Rather, under the TECA decision, the courts again will be embroiled in the type of economic regulation long ago disapproved as inappropriate to the judicial function. *Compare Lochner v. New York*, 198 U.S. 45 (1905), *with West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Placing the courts in such a position is also, in and of itself, a danger to State autonomy. As the Court recognized in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978), "if an adverse effect on competition were . . . enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed."

That the States are still in the better position than the courts to make these economic determinations is

exemplified by the TECA decision itself. TECA held that Puerto Rico's regulations were void because Congress intended the "open market" to operate. Puerto Rico however determined that the open market was in fact not operating within its borders, and sought to regulate on that basis. Logically, Puerto Rico's action is consistent with Congressional intention, as characterized by TECA. Yet TECA determined that the mere existence of local regulations was contrary to Congress' intent.

CONCLUSION

The TECA decision is contrary to the prior holdings of this Court, and, if allowed to stand, will seriously erode and burden legitimate State exercise of police powers. The decision infringes on the protection afforded the States as political participants in the federal system, contrary to the Tenth Amendment and the constitutional requirements for the exercise of Congress' lawmaking authority.

For the foregoing reasons, State *Amici* urge that the Writ of Certiorari to the Temporary Emergency Court of Appeals be granted, and that consideration be given to summary reversal of the decision of that court.

Respectfully submitted,

JAMES F. FLUG*
LEE ELLEN HELFRICH
PAULA DINERSTEIN
LOBEL, NOVINS, LAMONT
& FLUG
1275 K Street, N.W.
Washington, D.C. 20005
(202) 371-6626

DONALD J. HANAWAY
Attorney General
of Wisconsin
KEVIN J. O'CONNOR
Assistant Attorney General

EDWIN L. PITTMAN
Attorney General
of Mississippi
W.O. DILLARD
Special Assistant
Attorney General

FRANK J. KELLEY
Attorney General
of Michigan
LOUIS CARUSO
Solicitor General

LEROY S. ZIMMERMAN
Attorney General
of Pennsylvania

WARREN PRICE III
Attorney General
of Hawaii

DAVE FROHNMAYER
Attorney General
of Oregon

JAMES E. TIERNEY
Attorney General
of Maine

CHARLIE BROWN
Attorney General of
West Virginia

Attorneys for Amici Curiae

**Counsel of Record*

April 10, 1987

AMICUS CURIAE

BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. 86-1406

PUERTO RICO DEPARMENT OF

CONSUMER AFFAIRS, et al.,

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v.

ISLA PETROLEUM CORPORATION, et al.,

Respondents.

MOTION FOR LEAVE TO APPEAR

AS AMICUS CURIAE AND BRIEF IN SUPPORT OF

PETITION FOR A WRIT OF CERTIORARI TO THE

TEMPORARY EMERGENCY COURT OF APPEALS

Maximiliano Trujillo

P.O. Box 9481

Bayamón, Puerto Rico 00621

(809) 798-8602.

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more then 50% of the approximately 1,500 gasoline stations in Puerto Rico.

The PRGRA has been active for years in all matters pertaining to the regulation of the petroleum industry in Puerto Rico, and has participated in numerous proceedings, administrative, legislative and judicial.

As to the matter at hand, the PRGRA appeared as amicus curiae before the U.S. Court of Appeals for the First Circuit in the appeal filed by the Puerto Rico Department of Consumer Affairs with respect to the same cases decided by the U.S. District Court for the District of Puerto Rico which were the object of the appeal filed before the Temporary Emergency Court of Appeals, whose decision is sought to be reviewed before this Honorable Court.

PRGRA would have participated in the TECA appeal had it known that two appeals

had been filed. (PRGRA also participated as amicus curiae in the case of Esso Standard Oil (Puerto Rico) v. Department of Consumer Affairs, 793 F2d 431,CA-1 1986, a case that also dealt with the petroleum industry in Puerto Rico, the regulation of the price of the rents to be paid to the oil companies by the gasoline retailers).

The decision of this Honorable Court in the case at bar is of vital importance to the gasoline retailers in Puerto Rico, since the future of the state regulation of the petroleum industry is at stake in this case, and, although the PRGRA is not necessarily in agreement with all aspects of the petroleum regulations, and in the past has challenged many action of the Department of Consumer Affairs, the impact of the TECA decision seems to be to cast a large shadow of doubt over all type of

petroleum regulation in Puerto Rico. Many provisions of law and of various regula-- tions (as the rent price control regula-- tion upheld in the case of Esso, supra,) are of vital importance to the very sub-- sistence of the gasoline retailers in Puerto Rico. The striking down in one blow of the police power of Puerto Rico to regulate the petroleum industry, as the decision of TECA seems to imply, would mean that many hard fought legal provisions obtained in Puerto Rico for the protection of gasoline retailers and consumers would become ineffective through the alleged federal pre-emption in the petroleum industry regulation.

The present Motion is being filed since counsel for The Shell Company (Puerto Rico) Ltd. and Mobil Oil Caribe, Inc. expressed oposition to PRGRA parti- cipation in the present case as amicus

curiae. Counsel for Compañía Petrolera El Coquí, Inc. did not oppose our participation in this case (they did not participate in the TECA appeal); nor did counsel for the Department of Consumer Affairs of the Commonwealth of Puerto Rico. (Counsel for the other parties were not polled or did not reply to undersigned inquiry).

IT IS THEREFORE RESPECTFULLY REQUESTED THAT the Asociación de Detallistas de Gasolina de Puerto Rico, Inc. (Puerto Rico Gasoline Retailers Association, Inc.) be allowed to appear as amicus curiae in the present case.

In Bayamón, Puerto Rico, April 6, 1987.

Maximiliano Trujillo
P.O. Box 9481
Bayamón, PR 00621
(809) 798-8602.

I hereby certify that on this date a true and exact copy of this Motion and of the Brief of Amicus Curiae attached thereto has been served on the offices of the following:

Sweeting González & Cestero
Banco Centrl Building
Fourth Floor
Hato Rey, PR 00917
(809) 756-7150.

Emilio Pena-Fonseca, Esq.
Puerto Nuevo Distribution Center, Bldg. 1
De Diego Expressway, Barrio Palma
Intersection to Road No. 167
Cataño, PR 00632. (809) 788-1910.

Ana Matilde Nin, Esq.,
McConnel Valdes Kelley Sifre Griggs & Ruiz-Suria
Royal Bank Center
255 Ponce de León Ave., 10th. floor
Hato Rey, PR 00917
(809) 759-9292.

Lopez-Lay & Vizcarra
Parque 407 Condominium
407 Parque Street
Santurce, PR 00909
(809) 725-5300.

Cepeda, Sanchez-Betances & Sifre
Banco Central Building, suite 700
Hato Rey, PR 00917
(809) 756-7880.

Celso E. López, Esq.,
1000 Roberto H. Todd Avenue 2nd. floor
Santurce, PR 00910
(809) 721-5037.

Alvaro R. Calderón, Jr.
Squire Building Ponce de León and Ave.
and Vela Street, office 101
Hato Rey, PR 00918
(809) 753-5050.

Domínguez & Totti
Chase Manhattan Bank Bldg. 11th. floor
Office No. 1111
Hato Rey, PR 00918
(809) 753-7910.

William Estrella, Esq.,
150 Tetuán Street
Old San Juan, PR 00904
(809) 721-7481.

Alfredo Rafucci-Carrión
Puerto Rico Manufacturers Association
10 Chardón Avenue, S.J. Carrera Bldg.
Hato Rey, PR 00918
(809) 753-1960.

Dennis A. Simonpietri Monefeldt
Ramírez & Ramírez
117 Eleonor Roosevelt Avenue
Hato Rey, PR 00918
(809) 758-5660.

Lynn R. Coleman,
Skadden, Arps, Slate, Meagher & Flom
919 Eighteenth Street, N.W.
Washington, D.C. 20006
(202) 463-8700.

Maximiliano Trujillo.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

No. 86-1406

PUERTO RICO DEPARMENT OF

CONSUMER AFFAIRS, et al.,

Petitioners,

v.

ISLA PETROLEUM CORPORATION, et al.,

Respondents.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS FILED BY THE PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS

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I.- THE OBLITERATION OF THE POLICE POWER OF THE STATES.

Amicus curiae has, for many years labored to obtain protection for its members and all other gasoline retailers in Puerto Rico through many proposals for legislative or administrative actions.

There are various statutory and regulatory provisions in Puerto Rico for the protection of retailers and consumers vis-á-vis the oil companies. Vide; Law No. 3 of March 21, 1978, Law No. 73 of June 23, 1978, and Law No. 156 of July 20, 1979, codified at 23 Laws of Puerto Rico Annotated §§1101 to 1133 et seq.

The decision rendered by the Temporary Emergency Court of Appeals in the case at bar, because of its overbroad language, casts a shadow over the continued validity of said legislation and regulations, and may have grave consequences

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Act. 128 Cong. Record S2722,

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for the gasoline retailers in Puerto Rico, if the decision of TECA is not reversed. Also TECA's decision is at least, conceptually inconsistent with the decision in Esso v. Department of Consumer Affairs 793 F2d 431 (CA-1, 1986).

The exact wording of TECA's decision that amicus curiae considers overbroad:

> "Nothing in the legislative history of the EPCA convinces us that Congress' decision to remove federal controls should be interpreted 'as an invitation to the States to impose additional regulations.' Transcontinental, 106 S Ct at 717."

On the contrary, the legislative history convinces us that Congress intended to establish a market free

of any government control other than standby emergency controls."

(Emphasis in the original. At page 14a of the Appendix to the Petition).

"Nothing in the post-expiration legislative and executive actions persuades us that Congress intended to allow the states to step in and regulate the petroleum products markets after the expiration of federal authority. It is clear that the success or failure of Post-EPAA legislation was almost entirely dependent on the resulting degree of interference with a free market."

(At page 17a of the Appendix

to the Petition).

The supremacy clause of the United States Constitution, Article VI, clase 2 includes in its scope the Constitution, the treaties and the laws of the United States, and provides for the exclusiun of state in opposition thereto. TECA would have us to believe that a law that expired by it own terms has a continuing preemptive effect. (Energy Policy Conservation Act, P.L. 94-163, 89 Stat. 955, §461, codified at 15 USC §760g).

TECA bases its conclusion on a patently erroneous reading of this Honorable Court decision in the case of Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board, 106 S Ct 709 (1986).

Trancontinental, supra, is a case in which pre-emption is found within the context of a comprehensive federal regulatory scheme in which a particular link to

the regulatory chain was left to be pri-- ced by the market forces, BUT NOT UNREGU- LATED, the regulations consisted, for that particular link, in the price that would be set by the market forces. (The regulatory scheme is contained in the Natural Gas Act of 1938, 15 USC §§717-717w, as amended by the Natural Gas Policy Act of 1978, 15 USC §§3301-3432).

The courts and the states have a clear indication of congressional intent in the very texts of the statutes cited above. Whereas in the case at bar all parties concerned are at a loss as to what is the pre-emptive scope of Congress' action, since there is no law, or treaty that contains Congress' intention.

The interpretation given by TECA to the supremacy clause of the Constitution, supra, is such that it loses sight of the fact that the Constitution not only

grants powers to the Federal Government but also guarantees that the powers not delegated to the Federal Government are retained by the states and/or the people.

This Honorable Court has stated, in the case of South Carolina v. United States 199 US 437 (1905) at 452 that:

> "<t>he two governments, National and state, are each to exercise their power as not to interfere with the free and full exercise by the other of its powers."

This constitutional scheme works, not only to guarantee the operation of the National government, but also to guarantee the subsistence of the several states as autonomous bodies.

In Texas v. White, 7 Wall. 700, at 725 this Honorable Court (Taney) stated:

"Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

The governmental scheme that IECA has in mind is one that corresponds to a unitary form of government in which the va--

rious unit in a nation are mere adminis-- trative divisions of the central govern-- ment. But it is not the scheme conceived by the Framers, nor the one accepted by the people of the United States.

The decision below, not only goes against the holding in the case of Tully v. Mobil Oil Corp., 455 US 245 (1982), but also against the whole line of cases decided by this Honorable Court: Schwart v. Texas, 344 US 199; New York State De-- partment of Social Services v. Dublino, 413 US 405 (1973) etc.

The decision below, at pages 16a and 17a of the Appendix to the Petition, con- fines the police power of the states to regulate the petroleum industry to emer-- gency regulations and programs, yet it fails to understand that an emergency does not confer any power to regulate, but only the occasion to exercise a par--

ticular power Vide: Veix v. Sixth Ward Bldg. & Loan Assoc. of Newark, 310 US 32, at 39; following Home Building & Loan Assoc. v. Blaisdell, 290 US 426.

The inescapable conclusion is, therefore, that the TECA decision is wrong, as a matter of law and as a matter of poli-- cy, and must be reversed.

II.- TECA ERRED IN INTERPRETING THE POST-EXPIRATIONS ACTIONS OF THE EXECUTIVE AND LEGISLATIVE BRANCHES OF THE FEDERAL GOVERNMENT.

TECA states, at pages 14a and 15a of the Appendix to the Petition that:

> "Our review of these post-expiration actions strenghtens our conclusion that Congress intended to rely on market forces to determine the allocation and prices of petroleum products.

The impression given is that, the actions taken by the executive and the legislative branches of the goverment support the conclusion that after the expiration of the federal controls for prices and allocation of petroleum products NO OTHER regulations was constitutionally possible because it would be pre-empted.

There is nothing farther than the truth. Specifically in the case of Puerto Rico, the petroleum allocation regulations were never abbrogated, and are still in full force and effect.

After the approval of the Emergency Petroleum Allocation Act of 1973, P.L. No. 93-159, 87 Stat. 628, the government of the Commonwealth of Puerto Rico started to request special treatment for Puerto Rico from the Federal Energy Office, the predecessor to the Department of Ener

gy, and said agency, exercising the po---wers delegated to it by the President, pursuant to §5 of EPAA, delegated to Puer to Rico the authority to regulate the allocation of petroleum products. Federal Energy Office Order No.4, 39 Fed. Reg. 9507.

Pursuant to that delegation of authority the Department of Consumer Affairs of the Commonwealth of Puerto Rico issued two regulations, one regulation the allocations of petroleum products, and another regulating procedure, which were codified in 10 Code of Federal Regulations parts 660 and 661.

But the Department of Consumer Affairs promulgated those regulations, not only pursuant to federal law, as proded for in FEO's Order No. 4, supra, but also pursuant to state law, in particular to the powers conferred to it by its Orga

nic Act, Law No. 5 of April 23, 1973, as amended, 3 Laws of Puerto Rico Annotated §§341 et seq. One of the pcwers of DACO is that of establishing allocation regulations on staple commodities, pursuant to §3 of the Insular Supplies Act, Law No. 228 of May 12, 1942, 23 L.P.R.A. 734.

In view of fact that parts 660 and 661 above cited had been approved pursu-- ant to both federal and stated authority, when the time came to discontinue to fede ral controls the Department of Enery is-- sued an Order abrogating the allocations controls in all the Nation, except in Puerto Rico. Vide: Department of Energy Oil Decontrol Order, 46 Fed Reg 20306.

Said order specifically listed the regulations to be abrogated, which were: parts 205, 210, 211, 214 and 220 of title 10 of the Code of Federal Regulations. No mention was made of the Puerto Rican regu

gulations, parts 660 and 661.

If the Department of Energy, which was under and executive policy to decon-- trol the petroleum industry was carefull enough not to abrogate the Puerto Rican allocation regulations, because they were also issued under state law authority, what does it mean for the pre-emption argumenmt? It means that, even though the DOE was favorable to decontrol, it, under the federal-state separation of function would not second-guess the Puerto Rican government and let stand its regulations pursuant to state law, and because THEY HAD NO PRE-EMPTIVE POWER to abrogate a state regulation issued pursuant to the police power of the Commonwealth of Puer- to Rico.

On the other hand TECA fails to under stand the operation of the check and ba-- lances system provided for in the Consti-

tution, in particular the veto power of the President, pursuant to Article I, §7, paragraph 3. If a President vetoes a law passed by Congress, it is not and never was a law.

Congress passed the Standby Petroleum Allocation Act, S. 1503, 128 Congressional Record S2722, S2732 (1982), but it was vetoed by the President. The only fair conclusion is that there is NO LAW of the United States dealing with prices or allocation of petroleum products and there is now law that pre-empts any state law in the same field, because the field has not been occupied by the federal government.

Any other conclusion is not supported by the interpretation of the actions of the Congress and the President within the framework of the Constitution.

The inescapable conclusion is that

TECA erred in attributing pre-emptive intention to a bill that never became law pursuant to the Constitution.

III.- DEFERENCE ACCORDED PUERTO RICO WITHIN THE UNITED STATES FEDERAL SYSTEM.

The residents of Puerto Rico are entitled to have the laws approved by their representatives to their Legislature accorded the same deference as the the residents of the 50 states are with respect to theirs. Puerto Rico Federal Relations Act, 48 U.S.C. 737.

More so under the circumstances as the ones present in this case, in which there is no federal law in effect that is in conflict with state law.

Puerto Rico has been held to be a state in the ordinary sense of the word, although not one of the "50". Calero-Toledo v. Pearson Yacht Leasing Co., 416 US 663 (1974).

TECA erred in attributing pre-emptive intention to a bill that never became law pursuant to the Constitution.

III.- DEFERENCE ACCORDED PUERTO RICO WITHIN THE UNITED STATES FEDERAL SYSTEM.

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More so under the circumstances as the ones present in this case, in which there is no federal law in effect that is in conflict with state law.

Puerto Rico has been held to be a state in the ordinary sense of the word, although not one of the "50". Calero-Toledo v. Pearson Yacht Leasing Co., 416 US 663 (1974).

Puerto Rico has consistently received from the Federal Government a deferential treatment, in due regard to its special status within the federal system of the United States, and, also on account of its particular economic and geographic circumstances.

The treatment accorded Puerto Rico in relation to the petroleum industry is well illustrated by the delegation of authority granted it by FEO, as to the al-- location program, Order No. 4, supra, also in the area of price regulation for petroleum products, Puerto Rico received special treatment. For a brief discussion of the treatment accorded by the federal agencies that have delt with the petro--- leum industry: Texaco, Inc. v. F.E.A. 531 F2d 1071 (TECA 1976).

The special treatment accorded to Puerto Rico, in particular in the petro-

leum industry regulation, is due to the fact that Puerto Rico is a small island, heavily populated, and with almost no energy resources located within its boundaries. Theses circumstances coupled with the fact that, although there is competition a the retail level, at the wholesale there is a great market concentration, making Puerto Rico's an oligopolistic market. (There are two gasoline-producing plants in Puerto Rico: Phillips's, which is a petrochemical industry that produces gasoline from naphtha, and Gulf's which is a refinery. The wholesalers are: Esso, which is a subsidiary of Exxon, Texaco, Shell-Mobil, since they have merged locally, Gulf-Chevron, since they have merged nationally; and Isla Petroleum-Gasolinas de Puerto Rico. There are two small independent jobbers: Tennoco Oil Co., Inc. and Distribuidora de Gasolina El Coquí,

Inc. which in the aggregate represent a small portion of the market).

In view of the circumstances stated above, it is indispensable for Puerto Rican consumers and retailers that the Commonwealth of Puerto Rico exercise its police powers in order to balance out the economic distortions of an oligopolistic market.

Although TECA's decision is based on the alleged preference of the federal policy makers (both executive and legislative) for the forces of the free market, in Puerto Rico we do not have a free pe-- troleum products market, due to economic concentration. Therefore the factual circumstances obtainable in Puerto Rico make the decision rendered by TECA, one that does not serve the best interest of Puerto Rico, its consumers or its retailers.

IT IS THEREFORE respectfully reques-- ted that the decision rendered by the Tem porary Emergency Court of Appeals in the case at bar BE REVERSED.

In Bayamón, Puerto Rico, April 6, 1987.

Maximiliano Trujillo
P.O. Box 9481
Bayamón, PR 00621
(809) 798-8602

AMICUS CURIAE

BRIEF

MOTION FILED
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No. 86-1406

IN THE

Supreme Court of the United States

October Term, 1986

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,

Petitioners,

against

ISLA PETROLEUM CORPORATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* in Support of Petition for Writ of Certiorari

ROBERT ABRAMS
Attorney General of the State of New York
The Capitol
Albany, NY 12224
(518) 474-3197

O. PETER SHERWOOD
Solicitor General
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

FRANK K. WALSH
Assistant Attorney General of Counsel

THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7181—1987
(1200)

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No. 86-1406

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OCTOBER TERM, 1986

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

Motion for Leave to File Brief *Amicus Curiae* in Support of Petition for Writ of Certiorari

The State of New York respectfully moves for leave to file the attached brief of the States of New York, Connecticut, Maryland and New Jersey, and the National Associa-

tion of State Energy Officials, as *amici curiae* in support of petitioners. The consent of the attorney for the petitioners has been obtained. The consent of the attorneys for the respondents was requested but refused.

The interest of these states in this case arises from their concern that the holding of the Temporary Emergency Court of Appeals (TECA) that the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. §§ 751-760g (1976), an expired federal statute, preempts all state legislation in the area regulated by the EPAA before its expiration may have the effect of rewriting a substantial body of Supremacy Clause jurisprudence and altering the basic presumption that the police powers of the states are not preempted unless that is the clear and manifest purpose of Congress. In particular, the State of New York is concerned that TECA's holding may prevent enforcement of its "anti-price gouging" statute, N.Y. Gen. Bus. Law § 396-r (McKinney 1984), to the extent that such statute seeks to prevent the imposition of excessive prices for essential consumer goods or services, such as home heating oil, during periods of abnormal disruption of the market. The interest of the National Association of State Energy Officials in this case arises from its concern that the decision below could severely hamper the ability of the states to address local, regional or national energy disruptions.

Although this issue has been addressed in the petition, it is believed that the brief which *amici curiae* are requesting permission to file contains a more focused and com-

plete argument on this issue. This argument, if accepted, may ultimately be dispositive of this case.

Dated: Albany, New York
April 10, 1987

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of New York
The Capitol
Albany, New York 12224
(518) 474-3197

O. PETER SHERWOOD
Solicitor General
Counsel of Record

No. 86-1406

IN THE

Supreme Court of the United States

October Term, 1986

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,

Petitioners,

against

ISLA PETROLEUM CORPORATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

Brief of the States of New York, Connecticut, Maryland and New Jersey, and The National Association of State Energy Officials, as *Amici Curiae* in Support of Petitioners

ROBERT ABRAMS
Attorney General of the State of New York
The Capitol
Albany, NY 12224
(518) 474-3197

O. PETER SHERWOOD
Solicitor General
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

FRANK K. WALSH
Assistant Attorney General of Counsel

(Additional List of Counsel on Inside Cover)

JOSEPH I. LIEBERMAN
Attorney General of Connecticut
30 Trinity Street
Hartford, Connecticut 06106

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
7 North Calvert Street
Baltimore, Maryland 21202

W. CARY EDWARDS
Attorney General of New Jersey
Richard J. Hughes Justice Complex
CN112
Trenton, New Jersey 08625

JEFFREY C. GENZER
General Counsel
National Association of State Energy Officials
1615 M Street, N.W.
Suite 800
Washington, DC 20036

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Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301 *et seq.* 4

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N.Y. Gen. Bus. Law § 396-r (McKinney 1984).... 2

No. 86-1406

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,

Petitioners,

against

ISLA PETROLEUM CORPORATION, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

Brief of the States of New York, Connecticut, Maryland and New Jersey, and the National Association of State Energy Officials, as *Amici Curiae* in Support of Petitioners

INTEREST OF THE AMICI

This brief *amicus curiae* is submitted by the States of New York, Connecticut, Maryland and New Jersey, and the National Association of State Energy Officials. These states are concerned that the holding of the Temporary Emergency Court of Appeals (TECA) that the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. §§ 751-760g (1976), an expired federal statute, preempts all state legislation in the area regulated by the EPAA before its expiration may have the effect of rewriting a substantial body of Supremacy Clause jurisprudence and altering the basic presumption that the police powers of the states are not preempted unless that is the clear and manifest purpose of Congress. In particular, the State of New York is concerned that TECA's holding may prevent enforcement of its "anti-price gouging" statute, N.Y. Gen. Bus. Law § 396-r (McKinney 1984), to the extent that such statute seeks to prevent the imposition of excessive prices for essential consumer goods or services, such as home heating oil, during periods of abnormal disruption of the market.[1] The National Association of State Energy Officials is concerned that the decision below could severely hamper the ability of the states to address local, regional or national energy disruptions.

ARGUMENT

State law may not be preempted by the expiration of a temporary act of Congress.

This case presents a critically important issue concerning state-federal relations. The decision of the court below

[1] *Amici* take no position in regard to the wisdom of the particular regulations at issue in this matter.

constitutes an unwarranted usurpation of the authority of states and upsets the administration of important state laws. *See, e.g.*, Conn. Gen. Stat. § 21a-78a (1987); N.J. Stat. Ann. § 56:6-2 (West 1987); N.Y. Gen. Bus. Law § 396-r (McKinney 1984). The decision cannot be supported, as TECA sought to do, by reference to a now expired temporary statute and is plainly inconsistent with precedent in this Court.

Absent a clear manifestation of Congressional intent to preempt state legislation in a particular field, it will not be presumed that state law is preempted. *E.g., New York State Dept. of Social Services v. Dublino,* 413 U.S. 405, 413 (1973). This is especially true where the field which Congress is said to have preempted has been traditionally occupied by the states. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Indeed, we are not aware of any other case where preemption has been found to exist where Congress has completely removed federal controls from a field.

In this matter, TECA effectively reversed this presumption by stating the question presented as follows:

> "[W]e must determine whether by removing federal price control authority Congress intended to allow the states to step in and assume price control authority over gasoline."

App. A at 12a. The sole basis for TECA's reversal of this well-established presumption, as well as its determination that *Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982), was not dispositive of this matter, was its interpretation of certain language contained in *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board,* 106 S. Ct. 709 (1986). *Amici* submit that the language relied upon by TECA was

read totally out of context and without regard to the line of cases from which this language evolved. A brief analysis of this line of cases reveals that the lower court's holding in this matter is manifestly erroneous.

In *Transcontinental,* this Court considered whether its holding in *Northern Natural Gas Co. v. State Corporation Commission,* 372 U.S. 84 (1968), which struck down, on preemption grounds, a state's "ratable-take" order, had been altered by the enactment of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §§ 3301 *et seq.*, because the NGPA had removed the jurisdiction of the Federal Energy Regulatory Commission (FERC) over the wellhead sales of "high cost" natural gas. In holding that the "ratable-take" order was preempted by the NGPA, this Court noted that the NGPA does not constitute a federal retreat from a comprehensive gas policy. 106 S. Ct. at 716. Indeed, the NGPA is a comprehensive statute under which the new federal role is to oversee a national market price regulatory scheme. *Id.* Moreover, while Congress restricted FERC's regulatory authority over particular aspects of wellhead sales, the FERC continues to have substantial concerns with the purchasing practices of the pipelines, one of the elements preempting ratable-take orders under *Northern Natural Gas.* Thus, while passage of the NGPA constituted a decision that some aspects of natural gas regulations were to be reduced, it was not an invitation for more state regulation. Therefore, state regulation in those areas remained preempted. 106 S. Ct. at 717.

It was within this context that this Court stated that the proper question was not whether FERC had regulatory power over wellhead sales of gas, but whether Congress, in revising this comprehensive federal regulatory scheme aimed at giving market forces a more significant role, intended to give the states the power it had denied FERC.

This question was answered in the negative for two reasons. First, under this comprehensive scheme, when Congress meant to vest additional power in the states it did so explicitly. Second, although FERC's jurisdiction over the relationship between the purchasers' cost structures and the eventual costs to wholesale customers had been curtailed, that relationship was still a subject of deep federal concern. 106 S. Ct. at 717. Thus, Congress' failure to regulate in certain areas within the field was not to be viewed as creating a void in which the states were free to regulate, but rather as an authoritative federal determination that these areas should remain unregulated.

The differences between *Transcontinental* and this case are obvious. *Transcontinental* involved an area that remained subject to a comprehensive federal regulatory scheme, even though certain aspects of regulation were reduced. Thus, the presumption that state laws are not preempted absent clear Congressional intent to the contrary was sufficiently overcome because the field remained occupied. Here, by contrast, there is no comprehensive federal regulatory scheme governing the field. Indeed, the only federal regulation of the field was a temporary emergency measure that has been permitted to expire. There is simply no basis for concluding that Congress, by permitting the expiration of EPAA when the emergency with which it was designed to deal ended, preempted an area left to regulation or control by the states prior to the emergency. Indeed, no authority exists for such Congressional preemption of a field it has chosen not to regulate.

Analysis of the case law antedating *Transcontinental* further indicates that there is no support for TECA's holding in this matter. In *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission,* 461 U.S. 375 (1983), referred to in *Transcontinental,* 106 S. Ct. at 717,

this Court stated by way of dictum that a federal decision, to forgo regulation in a given area might imply a decision that the area is best left unregulated.[2] 461 U.S. at 384. In that case, however, the Court held that the language, policy and history of the Federal Power Act did not suggest such a conclusion with respect to rural electric cooperatives which Congress chose not to regulate. As noted by the Court, Congress' intent in enacting that law was to fill the regulatory gap created by *Public Utilities Commission of R.I. v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927), with respect to wholesale transactions of privately-owned electric and gas utilities engaged in interstate commerce. 461 U.S. at 384. Congress' decision not to regulate rural electric cooperatives did not evidence an intent to preempt state regulation in that area.[3] *Id.* Thus, this case does not support TECA's holding in this matter.

We believe that TECA's holding is without support. No case has been found which indicates that state law is preempted following Congress' withdrawal from a particular field. Indeed, it is submitted that, absent any Congressional declaration that the states are forever precluded from enacting petroleum product price controls, Congress' withdrawal should be viewed as clear evidence of an intent

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[2]In support of this statement, the Court cited *NLRB v. Nash-Finch Co.*, 404 U.S. 138 (1971), and *Fidelity Federal Savings and Loan Assn. v. De la Cuesta*, 458 U.S. 141 (1982). In the former case, preemption was based on the occupation of the field by the National Labor Relations Act. 404 U.S. at 144. In the latter case, preemption was based on a state law's conflict with a federal regulation. 458 U.S. at 155. Neither case supports TECA's holding in this matter finding presumption from a total federal withdrawal from the field.

[3]Where extensive regulations have been made, state regulation of a separable or distinct segment of the matter covered by federal statute is not preempted unless it is clear that the absence of federal regulation of this segment "takes on the character of a ruling that no regulation is appropriate or approved". *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 774 (1947).

not to preempt. *Cf. Pennsylvania v. Nelson*, 350 U.S. 497, 502 (1956) (State sedition laws not preempted between time Congress abandoned field in 1921 and reentered field in 1940). The decision below represents an extraordinary departure from existing law, permitting preemption from Congressional inaction with respect to an entire field. The implications of the decision, which would permit the courts to define vast areas of preemption where Congress has taken no legislative action, are farreaching and warrant review by this Court.

CONCLUSION.

The Court should grant the petition for certiorari.

Dated: Albany, New York
April 10, 1987

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of New York
The Capitol
Albany, New York 12224
(518) 474-3197

O. PETER SHERWOOD
Solicitor General
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

FRANK K. WALSH
Assistant Attorney General

of Counsel

JOINT APPENDIX

(13)

Supreme Court, U.S.
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CLERK

No. 86-1406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,
Petitioners,

v.

ISLA PETROLEUM CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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JOINT APPENDIX

LYNN R. COLEMAN
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000
Counsel for Petitioners

DONALD B. CRAVEN
MILLER & CHEVALIER, CHARTERED
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 626-5800
Counsel for Respondents

RAFAEL PEREZ-BACHS
MCCONNELL VALDES KELLEY SIFRE GRIGGS & RUIZ SURIA
Royal Bank Center
255 Ponce de Leon Avenue
Hato Rey, Puerto Rico
(809) 759-9592
Counsel for Respondents

PETITION FOR CERTIORARI FILED MARCH 2, 1987
CERTIORARI GRANTED OCTOBER 5, 1987

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3. Opinion of the United States District Court of the District of Puerto Rico, dated June 4, 1986	Supplemental Appendix
4. Opinion of the Temporary Emergency Court of Appeals of the United States, dated December 29, 1986	1a-27a
5. Order of the Temporary Emergency Court of Appeals of the United States denying petition for rehearing, entered on January 30, 1987	28a

* This Order is representative of the many orders issued on March 26, 1986, to all members of the Puerto Rican wholesale gasoline and refining industry.

RELEVANT DOCKET ENTRIES

Date	Docket #*	Description
1986		
May 5	1	Complaint filed by Tenoco.
May 5	2	Request for Temporary Restraining Order.
May 6	3	Order denying Temporary Restraining Order.
May 9	86-714, 1	Complaint for injunctive relief and declaratory judgment by Carribbean Gulf Refining Corp. Civ. 86-714.
May 9	86-714, 2	Motion for Temporary Restraining Order filed (Gulf)
May 9	86-714, 3	Motion for preliminary injunction (Gulf)
May 9	86-714, 5	Order to show cause
May 9	86-717, 1	Complaint by ESSO. Civ. 86-717
May 9	86-717, 2	Motion for preliminary injunction (ESSO)
May 9	86-717, 3	Motion for TRO (ESSO)
May 9	86-717, 4	Motion for consolidation of cases (ESSO)
May 9	86-718, 1	Complaint by Shell Co. (Puerto Rico) Ltd. and Mobil Oil Caribe for injunctive relief and declaratory judgment. Civ. 86-718
May 9	86-718, 3	Motion for TRO (Shell and Mobil)
May 9	86-719, 1	Complaint for injunctive relief and declaratory judgment by CIA Petrolera Caribe. Civ. 86-719

* Docket Number refers to Master Docket Sheet Civ. 86-0681 unless otherwise indicated.

Date	Docket #*	Description
May 9	86-720, 1	Complaint for injunctive relief and declaratory judgment by Texaco. Civ. 86-720
May 9	86-720, 2	Motion for TRO and preliminary injunction (Texaco)
May 12	86-721, 1	Complaint by Phillips. Civ. 86-721
May 12	86-730, 1	Complaint by ISLA Petroleum Corp. and Gasolinas de Puerto Rico Corp. Civ. 86-730
May 12	86-730, 2	Motion for preliminary injunction (ISLA)
May 12	86-730, 4	Motion for consolidation of cases (ISLA)
May 14	5	Amended complaint (Tenoco)
May 14	7	Order consolidating cases
May 15	14	Order denying TRO and directing DACO to pass on Tenoco's request for reconsideration
May 16	16	Order consolidating hearing for preliminary injunction with trial on the merits
May 19	26	Amended complaint for injunctive relief and declaratory judgment (Texaco)
May 20	33	Amended complaint for injunctive relief and declaratory judgment (ESSO)
May 20	39	Amended complaint for declaratory judgment (Phillips)

* Docket Number refers to Master Docket Sheet Civ. 86-0681 unless otherwise indicated.

Date	Docket #*	Description
May 20	40	Amended complaint for injunctive relief and declaratory judgment (Shell & Mobil)
May 20	41	Response in opposition to motion for preliminary injunction (DACO)
May 20	44	Second amended complaint for injunctive relief and declaratory judgment (Texaco)
May 20	45	Motion to dismiss by DACO
May 20	49	Stipulation between Tenoco, Coqui and DACO
May 20	53	Stipulation between Shell, Mobil and DACO
May 20	57	Amended complaint (Coqui)
May 21	64	Nonjury trial called
May 22	65	Brief in support of declaratory relief and partial reply to Defendants' response (Phillips)
May 22	66	Stipulation between Texaco and DACO
May 22	67	Stipulation between Phillips and DACO
May 22	67A	Second day of trial
May 23	68A	Third day of trial
May 27	69	Supplemental motion to dismiss by DACO
May 28	72	Reply to memorandum in support of Defendants' supplemental motion to dismiss (Shell, Mobil, Phillips)

* Docket Number refers to Master Docket Sheet Civ. 86-0681 unless otherwise indicated.

Date	Docket #*	Description
May 28	73	Reply to memorandum in support of Defendants' supplemental motion to dismiss (Gulf)
June 4	79	Memorandum opinion and order enjoining implementation of orders fixing prices or profit margins in petroleum wholesale or retail markets
June 5	80	Notice of appeal
June 5	81	Motion for stay of injunction pending appeal by Defendants
June 9	83	Opposition to motion for stay pending appeal (Shell, Mobil, Phillips)
June 9	84	Opposition to motion for stay pending appeal (Texaco)
June 9	85	Opposition to motion for stay pending appeal (Gulf)
June 10	87	Response to motion for stay pending appeal (Caribe)
June 10	88	Opposition to motion for stay pending appeal (Tenoco)
June 10	89	Opposition to motion for stay pending appeal (ISLA)
June 10	90	Order denying motion for stay
June 11	92	Errata to memorandum opinion and order
June 30	106	Notice of appeal to TECA
June 30	107	Attested copy of docket sheets mailed to TECA
Sept 10	119	Order from CCA denying motion for stay pending appeal

* Docket Number refers to Master Docket Sheet Civ. 86-0681 unless otherwise indicated.

PROCEEDINGS BEFORE TECA

Date	Description
June 23	Notice of Appeal and Rule 15(c) Statement
July 14	Brief of Appellants
July 21	Motion to Strike Defendants' "Record on Appeal" and Defendants' "Appendix"
July 21	Cross-Designation of Parts of Record to be Included in the Appendix and Issue to be Presented for Review
August 4	Appellees' Joint Brief (Shell, Mobil, Phillips, Gulf and Texaco)
August 4	Motion of American Petroleum Institute for leave to field Amicus Curiae brief
August 4	Brief of Appellee (ESSO)
August 5	Appellees' motion regarding TECA jurisdiction (Shell, Mobil, Phillips, Gulf and Texaco)
August 6	Brief of Appellees (Isla and Gasolinas)
August 12	Order granting motion of API to file Amicus Curiae brief
August 15	Reply Brief of Appellants
August 19	Memorandum on TECA jurisdiction (ESSO)
Sept 2	Motion adopting co-appelles' briefs (Caribe)
Oct 10	Case argued and submitted
Dec 29	Opinion and Judgment of TECA
Dec 29	Judgment entered by TECA

Date	Description
1987	
Jan 12	DACO's petition for rehearing and rehearing *en banc* filed
Jan 30	Order denying DACO's petition for rehearing and rehearing *en banc*

Commonwealth of Puerto Rico
Department of Consumer Affairs
Box 41059, Minillas Station
Santurce, Puerto Rico 00940

Regulation of Prices
No. 45, Amendment 1

IN THE MATTER OF:
PHILLIPS PUERTO RICO CORE, CORP.,
and CARIBBEAN GULF REFINING CORP.

TEMPORARY ORDER

On March 26, 1986, the Secretary of Consumer Affairs issued an order giving the captioned corporations notice of the effectiveness of Pricing Regulation No. 45, as amended, to the effect that any increase in the prices of gasoline should be notified 15 days before being put into effect. Prior to March 26, said corporations announced to their clients an increase in the prices of gasoline, attributing it to the excise tax established by Act No. 5 of March 18, 1986, corresponding to March. Thereafter, in April, these corporations announced to their clients new increases, based on the excise tax corresponding to said month.

The increases notified by these corporations to their clients are not related to the cited Act No. 5. When the first increase was announced, the gasoline that these businesses sold to their wholesalers was not encumbered by any excise tax, as it was produced from exempt raw materials, acquired before the effective date of said Act. When the second increase was announced, supposedly

motivated by the excise tax in force during the month of April, the gasoline being sold was produced from encumbered raw materials or raw materials encumbered with the *lesser* excise tax in effect for the month of March.

The Secretary of Consumer Affairs authorizes the captioned companies to transfer to the gasoline wholesalers the amounts attributable to the excise tax cited by Act No. 5.

It is further provided that this authorization will be conditioned on giving their clients credit on future purchases for the charges representing a fuel tax charged that did not correspond to the excise tax paid on the raw materials used to produce the gasoline. For purposes of this calculation, the method known as "FIRST-IN, FIRST-OUT" will be used.

The authorization granted is subject to the following terms:

1. The captioned companies will not be able to vary the method to be used, be this the historical or contractual one, to determine their prices, without the prior authorization of the Secretary.
2. Each and every one of their clients should be immediately informed of the method used to determine the price of the gasoline that they are sold, in the event they have not yet done so.
3. The above captioned companies may add to their per gallon sales price only that which corresponds to the excise tax imposed by Act No. 5 of March 18, 1986, that actually encumbers the raw material from which the gasoline they sell comes from.
4. The captioned corporations, upon commencement of sales of gasoline encumbered by the $5 excise tax prevailing in the month of April, shall offer

their wholesalers credits to compensate for the excess, representing excise taxes, billed up to that time. In each sale, said credit shall be equivalent to, at least, 50% of that which would correspondingly be charged for excise tax, until the excess has been covered. A report shall be prepared for each client, regarding the excess charged and the programming of the credits to be granted. A copy of this document shall be furnished to the Secretary within the next five (5) days. The price resulting from said operations shall not substitute the price resulting from the application of contractual provisions, if the latter is less.

5. The corporations shall furnish the Secretary with a report detailing the inventory unencumbered by any excise taxes and that which is encumbered by excise taxes imposed in March and April of 1986. In addition, they shall inform the dates of sale of each inventory.
6. The captioned corporations shall notify the Secretary of any variation in their prices attributable to the previous terms.

A copy of this Order shall be sent to the captioned corporations and to all of the wholesale distributors of gasoline.

This Order shall become effective on the same date as it is published in a newspaper with the greatest circulation in Puerto Rico.

In San Juan, Puerto Rico, this 23rd day of April, 1986.

PEDRO ORTIZ ALVAREZ
Secretary

/psr

BEST AVAILABLE COPY

COMMONWEALTH OF PUERTO RICO
DEPARTMENT OF CONSUMER AFFAIRS

IN THE MATTER OF WHOLESALE
DISTRIBUTORS OF GASOLINE

TEMPORARY ORDER OF MAXIMUM PRICES AND PROFIT MARGINS

On March 26, 1986 the Secretary of Consumer Affairs Department issued an order advising the enforceability of Regulation of Prices No. 45, Amendment 1, and the need that any increases in the sales prices of gasoline to the retailers be previously notified to the Consumer Affairs Department.

The refining companies that produce gasoline in Puerto Rico requested authorization to transfer to the wholesalers the excise tax they must pay pursuant to Law No. 5 of March 18, 1986. This Department has authorized said transfer. The excise tax that may be transferred to the wholesalers will be such as really imposed on raw material used to elaborate gasoline. The refining companies should grant wholesalers or distributors credits to compensate the excess invoiced by reason of the excise tax. In case that previous invoices have been collected that included charges for excise taxes not attributable to the raw material used to elaborate gasoline sold, the company shall return the profit so received for this concept.

At the moment of effectiveness of the excise tax, the majority of the wholesale distributors had not transferred to their clients the totality of the reduction of the gasoline price caused by the reduction of the petroleum price.

This Department has sufficient grounds to conclude, at least for the trimester preceding the enactment of Law No. 5, that the wholesalers had profits substantially higher than the margins considered reasonable for this industry. Commencing today, the maximum price at which gasoline may be sold to retailers will not exceed the one offered by the company to its clients as of March 31, 1986. It will not be possible to increase the price to retailers without express authorization from the Secretary of Consumer Affairs. Retailers will not have to pay any increases not expressly authorized. Any losses that are produced by the denial of such authorization will be charged against the profits obtained during the first trimester of this year.

It will not be necessary at this moment to make temperature adjustments.

The Secretary is aware of the arguments which have been made to him concerning the increase in the price of gasoline in the United States markets and the recent increase in the price of crude petroleum. He also considers that the reasonableness of the gross profit margin of 8.6 cents that until now we have considered appropriate and that in practice has been amply exceeded should be evaluated. For such reasons, you are cited to public hearings, to be held on May 9, 1986 [1] at 10:00 a.m. It is suggested to those interested in participating that they refer to the following matters:

1. The desirability of the existence of a gross permissible margin and how it should be determined.

2. The action that the Department should undertake as to violations to the established margins, which have occurred for extended periods of time.

[1 Subsequently postponed to May 12, 1986.]

3. The gross profit margins allowed in the United States and the gross margin actually had by companies where no regulations exist.

4. The reasons, if any, to allow larger margins in Puerto Rico.

This Order will become effective on the same date of its publication in a general circulation newspaper in Puerto Rico.

Issued in San Juan, Puerto Rico, on April 23, 1986.

(signed)

PEDRO ORTIZ ALVAREZ
Secretary

United States District Court
For the District of Puerto Rico

EXCERPTS OF RESPONSE IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

• • • •

DOCA's Price Control Program in 1986

In 1981, the average landed cost of crude oil imported into the United States stood at $36.52 per barrel. By December 1985, this number had gradually fallen to $25.26 per barrel. *See* U.S. Energy Information Administration, *Monthly Energy Review* at 89 (Jan. 1986). This gradual decline had a moderating influence on gasoline prices in Puerto Rico as well, with the exception of the occasional efforts, some of which are noted above, of certain wholesalers or retailers to reap profits in excess of those deemed proper by DOCA.

The situation changed dramatically, however, in late 1985. DOCA figures show that between November 1985 and February 1986, the price of West Texas Intermediate, a commonly accepted representative crude oil, declined 51%, from $30.80 to $15.15 a barrel. During the same period, Gulf Coast U.S. prices for waterborne cargoes of finished gasoline, which is accepted in many Puerto Rican supply contracts as a standard reference price, declined from 78.23 cents per gallon to 46.00 cents, a decline of 41%. But the decline in average wholesale prices in Puerto Rico went down only 15% during this period, from 98.6 cents to 83.5 cents per gallon (excluding taxes). (*See* Exhibit 12). While wholesaler's prices declined somewhat more rapidly in late February and early March, it must be recognized that these decreases occured [sic] as part of the major companies' belated efforts to convince the legislature of Puerto Rico that its pricing practices were reasonable and therefore a proposed tax on pretroleum [sic] should not be adopted.[5]

[5] To their credit, and in stark contrast to the conduct of the wholesalers, Puerto Rico's retail dealers passed on to consumers virtually all of the wholesalers' price reductions, since DOCA data

The legislation that the wholesalers, by their sudden price reductions, had unsuccessfully attempted to forestall, was Act No. 5, passed by the legislature on March 12, 1986. That legislation imposed an excise tax on crude oil and certain finished products. That this tax was a reaction to the failure of the wholesalers to pass on crude oil cost reductions is unmistakable from the legislation's explanation of motives, in which the legislature said:

> [S]ince the descent in the world oil price began, and today it is below $13.00 per barrel, no pattern whatsoever has been observed that indicates that the reduction has also been favorable to the Puerto Rican consumer. On the contrary, in Puerto Rico the price of gasoline, among other consumer goods, has remained stable. *This means that petroleum importers or distributors have increased their profits without a sufficient part of that price savings having been transferred to the consumer.*

(*See* Exhibit 13 at 1.)

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shows that retailers' prices declined by the same 15% that was passed on to them by the wholesalers. *Id.*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 86-0681 (JAF)
Consolidated with:

Civil No. 86-0730 (JAF)
Civil No. 86-0721 (JAF)
Civil No. 86-0720 (JAF)
Civil No. 86-0719 (JAF)
Civil No. 86-0718 (JAF)
Civil No. 86-0717 (JAF)
Civil No. 86-0714 (JAF)
Declaratory Judgment Claim
for Damages and Injunctive Relief

TENOCO OIL COMPANY INC. AND
DISTRIBUIDORA DE GASOLINA EL COQUI, INC.,
Plaintiffs,

VS.

DEPARTMENT OF CONSUMER AFFAIRS AND
PEDRO ORTIZ ALVAREZ, SECRETARY OF THE
DEPARTMENT OF CONSUMER AFFAIRS,
Defendants.

STIPULATIONS OF PLAINTIFFS AND DEFENDANTS IN CIVIL CASE NO. 86-0681

Docket 49, Pars. 6, 8, 9, 11, 12, 13 and 33

NOW COME plaintiffs, Tenoco Oil Company, Inc. and Distribuidora de Gasolinas El Coquí, Inc. and defendants Pedro Ortiz Alvarez and the Department of Consumer Affairs and hereby state that the following facts are to be stipulated, without further need of proof at trial, to wit:

6. Tenoco and Coquí compete in the second tier of this market as a wholesaler-distributor who purchases gasoline and other petroleum products from producers for resale and distribution to retailers who operate gasoline service stations throughout Puerto Rico.

8. Tenoco began its wholesale business of gasoline sale to retailers in 1984, and Coquí in 1983, as the smallest and youngest of all gasoline wholesale distributors. They successfully penetrated the distribution market for gasoline at the second (wholesale) tier through aggressive competitive pricing, based on streamlined overhead, which allows them to undersell competitors. Its share of the business grew monthly and during the month of March 1986, it sold 4,725,413 gallons of gasoline, which represent over 5% of the wholesale market. (A chart showing sales from December 1985 to May 1986 is enclosed herein as Exhibit "A-1" and also a Certification from Phillips for Sales from January 1986 thru April 1986 on volumes with some ink annotations as Exhibit "B".) Similar documents are submitted by Coquí, Exhibit I-A from January to May 1986 and Exhibit I-1, Certification from Phillips for sales from April 26 through May 15, 1986.

9. Tenoco and Coquí have provided, as acknowledged by defendants, the healthy competition sought by the Legislative Assembly of Puerto Rico in the approval of Act No. 73 of June 23, 1978 aimed at normalizing and establishing a healthy competition in industry. The legislative intent in Act No. 73 was to encourage real and effective competition in the gasoline industry with emphasis on free competition. It sought the greatest possible participation by new competitors in all levels of the industry.

In their April 29, 1986 Order which amended the April 23, 1986, defendants recognized Tenoco's and Coquí's contribution to the healthy competition in the market-

place and they further acknowledged that TENOCO and Coquí have never had unreasonable or excessive profits in the first quarter of 1986. The Order issued to Tenoco and Coquí reads as follows:

"RESOLUTION AND ORDER

The above captioned company is engaged in the distribution of gasoline in Puerto Rico. Has objected the application to it of the Order issued by the Department of Consumer Affairs to gasoline wholesalers, published on April 23, 1986.

The situation set forth by this company deserves special attention. *It is a small company, economically weak,* that distributes a small portion of gasoline which is sold in Puerto Rico. During the past years it *has added an important competition element in the gasoline market and has, in effect, stimulated lower prices for the consumer.*

The gross margin of profits of this company has normally been under the 8.6 cent per gallon, and ocasionally it has been substantially lower. The evidence gathered up to now does not allow to conclude that they withheld excessive earnings during the first three months of 1986 as a result of the reduction in the prices of crude oil. Their prices for March 31, 1986 were lower than those offered by the companies with higher volumes of sales.

In view of the foregoing, we hereby authorize the above captioned company to establish their prices of sale to retailers at the same level in which the competitors sell leaded and unleaded gasolines. Their prices must not allow a margin or profit higher than 8.6 cent per gallon. *Experience shows us that this company makes a special effort to maintain its prices underneath those of its competitors.* Nevertheless, for the purpose of verifying that it maintains that

pricing policy, they are required to file at this office, on Wednesdays of every week, copies of the bills of five (5) sales carried out on Mondays and five (5) on Thursdays.

Notify Mr. Andrés Romero and attorneys César Cortés and Carlos Romero Barceló.

Given in San Juan, Puerto Rico, on April 29, 1986.

Signed Pedro Ortiz Alvarez; Pedro Ortiz Alvarez, Secretary."

11. The worldwide prices of crude oil have, upon information and belief dramatically decreased between January, 1986, to April, 1986, from approximately $28 to $12 per barrel. This dramatic decrease in price has caused a decrease in the price of gasoline and other petroleum products.

12. Throughout this decrease in price, TENOCO and Coquí and other wholesalers have also reduced their prices, thereby transferring to the next level, the retailers, savings resulting from the reduction in their purchase prices. Tenoco and Coquí have maintained lower prices and passed on to their retailers, even greater savings than their competitors. (See Graph demonstrating sales of wholesalers since January to the present, which is made a part hereof as Exhibit "C".)

13. The sale price to retailers of gasoline by Tenoco went from $0.96 and $0.97 a gallon for both unleaded and leaded in January 1986 to $0.74 and $0.75 per gallon in April 1986. The sale price to retailers of Coquí went from $0.95 a gallon for both unleaded and leaded in January 1986 to $0.78 unleaded and $0.79 leaded.

33. TENOCO and Coquí have been trying to minimize its losses by: (1) trying to maintain as many of its clients as possible even though to do so, it has to sell at a loss, and (2) selling with as little loss as possible, which has made it less competitive. Being forced to be less competitive, TENOCO and Coquí have further lost clients which has reduced TENOCO's volume of business during the month of April by 891,560 gallons. (Certification of sales by Phillips is included as Exhibit "B" and Coquí's reduction in March lost 10,568 gallons per day.)

During the month of March, 1986, TENOCO sold 4,725,413 gallons of gasoline which represents an average of 157,514 gallons per day. Since March, TENOCO's volume of business has decreased to the point that during the full week of May 2 to May 9, the average daily sales were 68,123 gallons, which is a loss of 89,391 gallons per day. During the month of March Coquí sold 2,186,500 gallons, an average of 70,532 per day and during the first two weeks in May the average daily sales were 59,964, that is, a loss of 40,568.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 86-0681 (JAF)

TENOCO OIL COMPANY, INC. and
DISTRIBUIDORA DE GASOLINA EL COQUI, INC.,
Plaintiffs,

v.

DEPARTMENT OF CONSUMER AFFAIRS and
PEDRO ORTIZ ALVAREZ, Secretary of the
Department of Consumer Affairs,
Defendants.

STIPULATIONS REACHED BY PHILLIPS' AND THE SECRETARY OF DOCA

Docket 67, Par. 9

9. Pursuant to Rule 1006 of the Federal Rules of Evidence, Phillips prepared for use in this case summaries of Phillips' prices to its clients from 1981 through 1986, of naphtha's prices at which Phillips has purchased from 1981 through 1986, of the Gulf of Mexico coast prices from 1981 through 1986, and "Houston Rack" and "Miami Rack" gasoline prices from 1981 through 1986. The summaries show:

(a) That Phillips charged in January 1981 a price per gallon of $1.1128 for lead free gasoline, and $1.0825 for leaded gasoline (the "base prices".) Phillips reduced the prices per gallon of gasoline to its customers in Puerto Rico from $1.1128 (unleaded) and $1.0825 (leaded) in 1981, to $0.5157 and $0.5409 in March 1986.

(b) Phillips reduced its prices to its customers from an average of $0.7173 per gallon of unleaded gasoline and $0.7312 per gallon of leaded gasoline in January, 1986 to $0.5157 and $0.5409, respectively, by the end of March, 1986.

COMMONWEALTH OF PUERTO RICO
DEPARTMENT OF CONSUMER AFFAIRS
P.O. BOX 41059, MINILLAS STATION
SANTURCE, PUERTO RICO 00940

SECOND TEMPORARY RESOLUTION AND ORDER ON GASOLINE PRICES AND GROSS BENEFIT MARGINS

On April 23, 1986, the Department of Consumer Affairs issued two orders on gasoline prices. Together, these orders established objective criteria for controlling prices of sales by refineries to wholesalers, reminding wholesalers that they could not make a gross profit margin in excess of 8.6 cents per gallon, allowing refineries to pass on to the wholesalers the full effect of the excise tax levied by Law No. 5 of March 18, 1986, and establishing maximum prices in sales by wholesalers to retailers at the levels prevailing on March 31, 1986.

The Department's determinations were based on the following facts:

1) When federal controls on gasoline were eliminated by Executive Order of the President of the United States on January 28, 1981, this Department immediately put into effect Regulation No. 45, Amendment No. 1 in its entirety; it required wholesalers and retailers to provide advance notice to the Department as to all price increases and jusification thereof, and it established 8.6 cents per gallon for wholesalers and 17.7 cents per gallon for retailers as the maximum gross profit margins against which all price changes would be judged. These maximum margins were the same as those authorized by federal regulations when control ceased.

2) There is abundant evidence that both wholesalers and retailers had knowledge of and recognized this regulation, including the gross margin limitations and acted pursuant to them.

3) In recent months, large wholesalers failed to adhere to the referenced margin of 8.6 cents per gallon. This problematic situation peaked during the first quarter of this year, when the majority of wholesalers charged prices that, in some cases, tripled the referenced margin and doubled those that they obtained in 1985. This situation was brought about by the substantial reduction in the cost of gasoline in sales to wholesalers, which was not passed on by the wholesalers to their customers.

4) Said Law No. 5 was passed with the purpose of retrieving for the people of Puerto Rico a part of those excess profits. The legislative intent was that the excise tax be paid by those importers and distributors who were not passing this reduction on to the consumers. One of the purposes of the April 23 orders was to carry out this legislative intent.

5) Wholesalers have never made any attempt to justify to this Department the high profit margins they were realizing in recent months. To the contrary, the available evidence indicates that such margins were highly inappropriate. In some cases they were five to six times greater than what the same companies realized in 1982-83. Inasmuch as inflation and interest rates in Puerto Rico have declined in the intervening period, there is little likelihood that these margin increases could be justified by cost increases. Further, the margins of these companies exceeded the margins that are being realized at the same level of distribution in the United States. No effort has been made by wholesalers to explain these discrepancies.

When we issued the April 23 orders, we intended that their duration be brief, but at the same time we wanted

to make sure that the people of Puerto Rico would not suffer the effect of the new excise tax, and that wholesalers' margins would return to more reasonable levels. We also expressed our concern with respect to the fact that wholesalers were obtaining margins in excess of those authorized, and we announced public hearings to receive guidance on the necessity of making adjustments to our orders pursuant to the arguments of the wholesalers, among other things. Unfortunately, wholesalers denied us the opportunity of listening to their views on this point, since they boycotted the public hearings held on May 12, 1986.

After the order of April 23, 1986 was issued, gasoline and petroleum prices in the US markets increased. These markets' prices serve as indicators that determine gasoline prices in Puerto Rico due to four principal reasons, to wit: (1) supply contracts use those markets as reference points; (2) imported gasoline, which exceeds 25 percent of local consumption, is purchased in accordance to prices prevailing on the Gulf Coast of the US; (3) a substantial part of gasoline transactions in Puerto Rico are based on exchanges made in the US; and (4) if prices paid in Puerto Rico were less than those prevailing in the US, probably local producers would prefer to sell their gasoline outside Puerto Rico. Even though some wholesalers have not responded to recent requests of this Department for precise information, the Department takes notice that these movements in the markets undoubtedly and since March 31 resulted in significant increases in the costs being paid by wholesalers.

Because of these increases, the majority of wholesalers appear to be selling at or near their cost. In this manner, they have already returned a portion of the excess charged during the first quarter of the year. For some companies, however, there is still a part of said excess charge for which the consuming public should be compensated; and therefore, for those companies prices should continue to reflect the refund to the profits unduly

received in the first quarter. Nevertheless, because it is not the intention of this Department to require any company to operate with a negative benefit margin, present circumstances justify changes to our orders of April 23, 1986.

Price increases in the gasoline and petroleum markets, which in turn have increased wholesalers' costs, can justify some small increase in the price of gasoline to the retailer, even if wholesalers' margins are maintained at reasonable levels. But in order to stabilize the market and to prevent consumers from feeling undue effects, we have activated the Basic Commodities Fund to effect temporary adjustments to protect consumers.

In accordance with the aforementioned reasons, we issue the following:

TEMPORARY ORDER

1) Wholesalers not included in Paragraph 2 below may sell their gasoline to retailers for the price that results by adding to the cost of their gasoline a gross profit margin of 8.6 cents per gallon, which is the maximum gross profit margin that a wholesaler can realize. If any of such wholesalers were to import gasoline to sell in Puerto Rico, it shall receive a credit of ten (10) cents per gallon for gasoline sold starting May 21, 1986 to be paid by the Department of Consumers Affairs under the authority vested upon it by Article 3 of Law No. 228 of May 12, 1942, as amended. These wholesalers may sell at a price that results by adding 8.6 cents per gallon to the acquisition cost of the product after subtracting the credit to be paid by the Department. The Department has determined on the basis of available information that the wholesalers covered at this time by this paragraph are: Compañía Petrolera Caribe, Inc., Tenoco Oil Co., Inc., and Distribuidora de Gasolina El Coquí, Inc.

2) Wholesalers who obtained an average gross profit margin in excess of 8.6 cents per gallon during the first

quarter of this year and who have not already reimbursed the amount of such excess in spite of having received gross profit margins of less than 8.6 cents per gallon as a result of the order of April 23, 1986 may sell their gasoline to retailers for the price that results by adding to their gasoline acquisition cost a gross benefit margin of 3.6 cents per gallon. If any of such wholesalers were to import gasoline to sell in Puerto Rico, it shall receive a credit of five (5) cents per gallon to be paid by the Department of Consumer Affairs for gasoline sold starting May 21, 1986. These wholesalers may sell at the price that results by adding 3.6 cents per gallon to their cost, after subtracting the credit to be paid by the Department. The Department has determined on the basis of available information that the wholesalers covered by this paragraph, at this time, are: Texaco Puerto Rico, Inc.; The Shell Company (Puerto Rico) Limited, and Mobil Oil Caribe, Inc.; Esso Standard Oil Co. (P.R.); Caribbean Gulf Refining Corporation; Isla Petroleum Corporation. Nevertheless, any of these wholesalers may petition to be covered by Paragraph 1 above if it can demonstrate to the satisfaction of this Department that is has reimbursed the excess in its profit margin in the manner described above.

3) Refineries may sell to wholesalers according to the formula expressed and authorized in the order of April 23, 1986 for Phillips Puerto Rico Core and Caribbean Gulf Refining Corporation. However, they must give a ten (10) cent per gallon credit on the price charged to those wholesalers covered by Paragraph 1 above, and a five (5) cent per gallon credit on the price charged to those wholesalers covered by Paragraph 2 above. This credit shall be applied to the current price, provided such price is not less than the price that was in effect on Friday, April 25, 1986. If the current price goes down to levels lower than those of April 25, 1986, the credit shall be reduced by an amount corresponding to the reduction, but it shall never be less than zero. This credit shall be

reimbursed by the Department of Consumer Affairs and shall be given for all gasoline delivered, starting May 21, 1986. If such gasoline has already been paid for and that fact is demonstrated to the satisfaction of the Department, the latter shall give said credit to the wholesaler.

4) Wholesalers included in Paragraphs 1 and 2 who have gasoline produced in Puerto Rico in stock and who have not received for such gasoline the benefit of either the ten or five cents mentioned in Paragraph 3, shall subtract ten or five cents, as the case may be, from the real cost of their gasoline, before adding their gross profit margins of 8.6 or 3.6 cents, as applicable. This credit shall be reimbursed to such wholesalers by the Department of Consumer Affairs once said stock and cost reductions are demonstrated to the satisfaction of this Department.

5) Retailers may realize a gross profit margin of 17.7 cents per gallon, including both cash and credit sales of gasoline.

6) The Temporary Order on Maximum Prices and Profit Margins of April 23, 1986 applicable to wholesalers is hereby rescinded.

In addition to having the favorable result of causing the return of undue profits realized by some companies in the first quarter of this year, the distinction being made between the wholesalers covered by Paragraph 2 will also help to preserve the competitive viability of the non-branded, independent wholesalers that to some extent have historically provided the valuable function of disciplining wholesale gasoline prices in Puerto Rico. In order to maintain effectively their share of the market, these companies usually price their product some cents below the price being charged by the major branded wholesalers. Wholesalers covered by Paragraph 2 include all of the major branded wholesalers, while all of the smaller wholesalers, except one, did not have excessive profits in the first quarter which are still subject to reimbursement;

and therefore, are covered by Paragraph 1. Furthermore, the information available to the Department indicates that one small wholesaler now covered by Paragraph 2 will soon have reimbursed its excess margins realized in the first quarter if it has not done so already, and will shift to coverage under Paragraph 1. Since all of the smaller firms must generally set prices below those of larger firms and are therefore not affected directly by margin controls, the distinction made herein should allow them to maintain their normal competitive relationship with the larger firms while still realizing their historical margins.

The credits to be paid by the Department pursuant to the preceding paragraphs are temporary, and have the purpose of stabilizing product prices to consumers while the market is adjusting to these changes. The Consumer Affairs Department will discontinue said credits when it determines that they are no longer necessary.

The foregoing action is taken immediately for the purpose of making appropriate adjustments to the April 23, 1986 orders. The situation will be under continuous review, and further adjustments will be made as circumstances warrant. In order to determine as promptly as possible the effects of this Temporary Order, and to receive information that will assist the Department to attain its ultimate objective of allowing competitive forces to be the ones that control prices, the Department is hereby establishing the following procedures:

1) Companies adversely affected by this order may file promptly with the Department a request for special relief from this Temporary Order. A hearing shall be scheduled during which the affected company can present its case for special relief within five (5) business days after the date of receipt of said request. A company seeking such relief shall submit to the Department, during such hearing, detailed evidence of its costs, including operating costs and such other information as it wishes to present in

support of its request. The Department will establish appropriate procedures to preserve the confidentiality of any exclusive proprietary information submitted by the companies. Any company covered by Paragraph 2 that submits a request for special relief under this paragraph shall submit together with its request, computations showing the excess charged to clients over the gross profit margin of 8.6 cents per gallon during the first quarter of 1986, and the extent to which such excess has been reduced in the current quarter.

2) A public hearing is hereby convened for June 2, 1986 at 9:30 A.M. at the Félix Mejías room of this Department, 4th Floor, Minilla Government Center, North Building, De Diego Ave., Santurce, to receive comments from all interested persons on the adequacy of this Temporary Order and on any modifications that should be made to attain a situation where primary reliance can be placed on competitive market forces to maintain fair margins at all levels of distribution and fair prices for the consumer. In particular, the companies directly affected by this Temporary Order, as well as the public in general, are requested to address the following questions:

a) whether operating costs of wholesalers have increased significantly since 1981 when federal controls ended and the informative margin of 8.6 cents per gallon was adopted by this Department; and if so, the extent of and the reasons for such increases;

b) whether there are significant differences between the operating costs of wholesalers in Puerto Rico and wholesalers in the US; and if so, state the reasons for those differences;

c) the reasons why wholesalers' margins increased substantially in the first quarter of 1986 as their costs decreased; and what measures, if any, should be adopted by the Department under existing law to prevent any recurrence of this circumstance in the future;

d) the manner in which, and the schedule on which, changes should be made to this Temporary Order in order to achieve its long-term objectives of:

(1) obtaining restitution from the companies for unreasonable profits that they received in the first quarter;

(2) attaining price stability for Puerto Rico's consumers;

(3) attaining vigorous competition among all wholesalers in Puerto Rico, including maintenance of the competitive viability of the small wholesaler; and

(4) attaining as soon as possible a situation in which the competitive forces are primarily dependent upon forces to regulate gasoline in the gasoline markets in Puerto Rico.

The hearing examiner assigned to preside at these public hearings will determine the procedure for the orderly receipt of evidence and to assure that all interested persons be heard. In accordance with the foregoing, all persons wishing to be heard shall submit their names and all written material they wish to be considered by this Department at the Secretary's office, at least 24 hours prior to the public hearings.

This second temporary resolution and order shall be effective on Wednesday, May 21, 1986 after publication in a newspaper of general circulation in Puerto Rico.

In San Juan, Puerto Rico, on May 20, 1986.

/s/ Pedro E. Ortiz Alvarez
PEDRO ORTIZ ALVAREZ
Secretary
United States District Court
For the District of Puerto Rico

[EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS]

May 21, 1986

* * * *

[BY MR. ROMERO] [ATTORNEY FOR TENOCO]

[29] I'm going to have marked for identification [30] the newspaper ad. It is number four in Tennoco's exhibits. It is a photocopy of a newspaper ad.

THE COURT: It will be Identification 32.

THE CLERK: It is already marked as number four.

THE COURT: Number four.

BY MR. ROMERO:

Q. I will show you Identification No. 4. It is a photocopy. Please tell me if you recognize this ad?

(Whereupon, the above mentioned ad is shown to the witness.)

[BY MR. AGOSTO ALICEA—SECRETARY OF THE TREASURY]

A. Yes.

Q. You recognize the ad?

A. Yes, I do.

Q. And this ad was placed in El Vocero on the 17th of March, Monday the seventeenth of March, is that correct?

A. If that is the date.

Q. That is the date.

A. Shown there, yes.

Q. And you approved this and had it payed for by the Department of the Treasury?

A. That ad was prepared by our advertising agency and I approved the publication.

Q. Now, this ad was published one day before the governor signed a bill, law number five—to make into a law which is March 18. It was published in newspaper as part of a campaign and you [31] answered this.

* * * *

[BY MR. CALDERON—ATTORNEY FOR ISLA AND GASOLINAS]

[61] Your Honor, may I suggest for purposes [62] of gaining time, Mr. Robinson said that he does not have any objection. I don't think that Mr. Romero has to go through showing the witness the documents because—

THE COURT: There is no objection, we can mark all those documents. As a matter of fact, let's take a ten minute recess for marking the exhibits that there are no objections to. We will take a ten minute recess.

(Whereupon at this time a ten minutes recess is taken.)

MR. ROMERO: Your Honor, now we have introduced into evidence all the documents which were indicated in the Pretrial order. That is twenty-one exhibits and they have already been marked as exhibits and they have been admitted into evidence.

BY MR. ROMERO:

Q. Mr. Mason, you have indicated that to determine the price, you determine the prices approximately every week and that there has been a change in the formula. Why was the formula changed?

[BY MR. ROBERT MASON—PHILLIPS]

A. Changed at what point? What point in time are you referring to?

Q. You said that there has been some changes in the pricing formula. Why were those changes made?

A. We have changed them a number of times to try to meet with the competitive conditions in Puerto Rico.

Q. But Tenoco or Coquí have no influence whatsoever on your [63] determination of the formula of the prices that you are charging them?

A. That is correct.

Q. And you make your own determinations and you inform them on Friday, usually Friday afternoon unless

there was a change in the middle of the week that you decide to make?

A. That is correct.

Q. And you have made those changes in the middle of the week also?

A. Yes, on occasions.

Q. And you have not made the fifteen day prior day notice that is indicated in the order of March 23rd in regulation number forty five of DACO?

A. No.

Q. Mr. Mason, I asked you in the subpoena to bring the printout of the sales of gasoline to Tenoco for the period of March first until present. Did you bring those printouts with you?

A. Yes, I did.

MR. ROMERO: Can we have them marked for identification?

THE CLERK: Identification 23, Your Honor.

(Identification No. 23 for Plaintiff Tenoco marked at this time.)

MR. ROMERO: I'm showing them to defendant's attorney.

THE COURT: Is it twenty-three or thirty-three?

* * * *

[BY MR. MASON]

[72] A. That is correct.

[BY MR. ROBINSON—ATTORNEY FOR DACO]

Q. Now, why is there that 2.5 cent differential? Is that an attempt to reflect the transportation charges of moving gas from Houston to Miami?

A. No, that's what we think the market will bear in Puerto Rico.

Q. I see. This the differential ordinarily between the Miami Rack price and the Houston Rack price, is it generally in the range, without holding you to a particular

number, of two, two and a half cents, three cents, somewhere around there?

A. I guess.

Q. So, apparently the market in Miami will bear somewhat higher price than the market in Houston, is that correct?

A. Correct.

Q. And is that in part due to the fact that a lot of gasoline is produced in Houston and very little is produced in Miami?

A. I presume that's the case, yes.

Q. That in order to have gasoline in Miami it has to be shipped there from somewhere else like the Houston area?

A. I presume that's the case, yes.

Q. So even though Phillips is producing gasoline in Puerto Rico, it is pricing its gasoline in competition in essence with gasoline that would have to be imported here from some location in the continental United States, is that correct?

A. It might be imported from anywhere.

[73] Q. But, the price that is charged by Phillips here is a price that would be competitive with the price of gasoline that would be imported from some other location, either the continental United States or any other location? Is that how you—

A. I presume that's the case, otherwise there would be more imports of gasoline in Puerto Rico if our price was not competitive.

Q. Now, why do you add 2.5 cents to the price of unleaded gasoline to determine the price of regular gasoline?

A. Because of the quality difference between unleaded and leaded gasoline.

Q. Does the leaded gasoline have a higher octane?

A. Yes.

Q. Is that the quality difference?

A. That's part of the quality difference, yes.

Q. Are you familiar with the relative prices of leaded and unleaded gasoline in the United States?

A. Yes.

Q. And isn't it generally the case that the price of unleaded gasoline in the United States is higher than the price of leaded gasoline?

A. Currently those prices are approximately equal and there have been times in the last several months that leaded gasoline is mainly the higher price.

Q. I am talking about the continental United States.

* * * *

[BY MR. ROBINSON—RECROSS]

[108] Q. Now, if somebody knew what your prices were and had been following your prices over a time, it wouldn't take you very long, very much to figure out what your pricing formula was, would it?

[BY MR. MASON]

A. Yes, that would be fair to say.

Q. If that's the case, then why is it so important that you now change your pricing formula because you have disclosed in Federal Court what your pricing mechanism is?

A. We say it is not good business practice for competitors or general public to know what our sales prices for gasoline are.

Q. Even though you are pricing now in accordance with a specific formula that arrives at a precise price right down to the tenth of a cent, would you say it is general proposition that you set your prices at a level which is, I think as you put it earlier, what the market would bear?

A. Yes. We hope so. We hope to get as much as we can for our gasoline.

Q. That's what any competitive businessman would do in a competitive market?

A. Yes.

Q. Now, the formula that you have come up with is a formula that is just a mechanism at arriving at a price which has that ultimate objective of being priced at what the market will bear, is that correct? In other words, the formula is just a mechanism at getting to the end result of trying to have a price which is [109] exactly what the market will bear? No more no less?

A. I can't be exact but yes, more or less.

Q. So, it is also the case that you came up with a different formula and you based your prices off of the New York Postings or California Postings or Rotterdam Postings, whatever they were based off of you would still end up with approximately the same price that you are charging today?

A. Possibly on an average, although it could be higher or lower.

Q. Now, did I correctly understand your testimony to be that—let me start this way. Do you understand Phillips to be subject to the terms of the March 26 order that is at issue in this case, the March 26 order of DACO?

A. No.

Q. Phillips is not required to comply with that order?

A. I understand that the contract—

Q. I am not trying to get into a legal argument with you as to whether or not Phillips has a defense as to that. What I am just trying to get is your understanding of whether or not under the terms of that order it is intended to apply to Phillips.

MR. ROMERO: Objection, Your Honor. The asking of the question from the witness was the order itself directed to Phillips. There is an order directed to Gulf and there is an order directed to Phillips.

* * * *

[135] THE COURT: Let's mark it.

MR. ROMERO: As an exhibit.

Whereupon,

PEDRO ORTIZ ALVAREZ,

after first having been duly sworn was examined and testified as follows.

DIRECT EXAMINATION

BY MR. ROMERO:

Q. State your name for the record?

A. Pedro Ortíz Alvarez.

Q. What is your present occupation?

A. Secretary of Consumer Affairs for the Commonwealth of Puerto Rico.

Q. When were you sworn in?

A. March 26, 1986.

Q. What was your occupation before that?

A. I was a dean at the law school of the Catholic University of Puerto Rico.

Q. And what is your profession?

A. Attorney.

Q. Did you specialize in a particular field of law?

A. Well, I have taught civil procedure, constitutional law, civil rights, federal jurisdiction, special legal proceedings.

Q. This constitutional law, I would say is your strength in [136] your profession?

* * * *

[BY MR. ORTIZ ALVAREZ—SECRETARY OF DACO]

[138] A. Well, I had been working on this problem since I was appointed. On that particular order I would say that I had been working on drafts, ideas and considering facts and evaluating that and taking into account opinions since April 23rd when I issued the second order.

[DIRECT BY MR. ROMERO]

Q. Since April 23rd and when did you have this final draft?

A. Oh, I think that the final draft was finished Monday night. It was issued yesterday. The final draft was ready on Monday at eight o'clock. Something like that.

Q. So, while we were discussing the case during the weekend you were working on this order?

A. Sure.

Q. No indication of that has been given to us.

A. Well, I publicly announced two or three weeks ago that I was working on a new order. That is the final result of the long process.

Q. So, you were satisfied with the expertise that you say you have in the oil industry?

A. Sure. I say that I have the best expertise available on my side. For example, people like Mr. Coleman and Mr. Robinson who are well recognized experts in the United States. And I think that from the government's side the people who best know the industry of gasoline in Puerto Rico are working on that.

Q. But of the ones that advised you, only Mr. La Santa has [139] experience since 1985 working in DACO, but he has no special studies in the oil industry, does he?

* * * *

BY MR. ROMERO:

[144] Q. So, you know of no other company that was fined or otherwise restricted or made to pay for not doing that?

[BY MR. ORTIZ ALVAREZ]

A. No. I think that Ramos established a very productive communicative channel with the industry and he was able to impose the control without going to his powers of imposing the fine.

Q. You have never imposed the fine in the past, in 1981 on Phillips?

A. No, no, no. It should be on the record that Phillips was not under the control of the profit margins. The profit margins were for distributors and retailers.

Q. I am not talking about the profit margins. I am talking about the fifteen days notice.

A. Well, no, there is—they were advised of the option, of the regulation but they were never fined.

Q. No action was taken and they were notified in the March 26 order telling them too and they didn't notify you and you know they were raising their prices every week?

A. Well, during that process I knew about their actions. I was called by their attorneys sometimes. I was deciding what was I [145] going to do with the excise tax. Who was going to pay. The study that I conducted in the department revealed that the refineries were not having excess profits during the first quarter of the year. So, I decided that the distributors should have the responsibilities to pay for the excise tax recently imposed by the government.

Q. That was your sole decision?

A. It was my decision, yes.

Q. You mean the governor had no input into that or the secretary of Treasury did not have any input?

A. No. I informed the governor and the Secretary of the Treasury about my plan to permit all the refineries to pass over the tax to the distributors. I informed them, yes.

Q. No, no. I'm trying to say that not passing to the consumer, that was not your decision?

A. It is—it was a policy stated by the governor.

Q. Before you were even appointed?

A. Yes.

Q. When you went to the hearings for confirmation?

A. Yes.

Q. That was discussed and they asked you and you said that you had to look at it very carefully. You still don't know and it was already policy?

A. And I agree with that policy. It is a sound policy.

* * * *

[BY MR. ORTIZ ALVAREZ]

[150] A. I have checked all the contracts of the industry, all the financial data submitted by all the companies. I have evaluated the situation of the industry in the United States. I have evaluated all the documents there in the office of DACO. All the orders issued by Ramos. I have seen thousands of pages.

[BY MR. ROMERO]

Q. So, you have seen all that. Now, tell me how you determined in the order oh [sic] May 20, who pays—you have that deduction of five cents on the price of Esso and CARECO and those others that have exchanges, how do you apply that five cent discount?

A. The experience of the department shows that the prices prevailing in the Gulf Coast and in similar markets in the United States can give you a clear indication of what are the prices in Puerto Rico. The experience of the department is that the prices paid by all companies do not vary too much. There are variations of course, because there are different contracts, but they don't vary too much.

Q. I do not think you have understood my question. How do you determine from what price to deduct the five cents, that you said the second group of wholesalers will be allowed a deduction of five cents, from where—what is—how do you determine that price if there is an exchange and it was not a price? Who bears the burden of that price? Do you expect Phillips to bear the burden of the price on the exchanges operated in Puerto Rico with Esso?

* * * *

[THE COURT]

[152] Let me see if I can help. I think that the question is understood by everybody here. The doubt that we have and do not know whether this is something that was really thought out, is how do you apply in a [153] prac-

tical context the five cent discount when the economical transaction from a standpoint of money transfer may occur in Texas? Is that the question?

MR. ROMERO: Yes, Your Honor, that is correct.

[BY MR. ORTIZ ALVAREZ]

THE WITNESS: But it has a price according to the contract because they have to operate according to the price prevailing in the market in Houston. It is published almost daily, the Platts Oil Gram.

THE COURT: Well, I understand the question but with all due respect I don't understand the answer. Therefore, keep on trying.

BY MR. ROMERO:

Q. Mr. Ortíz, the five cents deducted or the ten cents deducted where there is a sale you say to Phillips or to the other refineries in Puerto Rico, you keep back ten cents for this group, you keep back five cents and you lower your price. That is understood. But, when there is no price being received, no money being received from the person whom you deliver gasoline to, how do you operate that five cents?

A. But it has a value because—

Q. We know it has a value but there is no money transaction. How do you operate the five cents if somebody else is delivering over there?

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[BY MR. ROMERO]

[161] Q. My question is, did you not refer to all those wholesalers?

[BY MR. ORTIZ ALVAREZ]

A. Not all of them violated the 8.6 margin. Not all of them, but most of them.

Q. But you said all of them in your April 23rd order?

A. I should see the order because I do not recall the precise language. Of course, I was referring to the industry as a whole.

MR. ROMERO: I am showing defendant Exhibit 9 which is a temporary order of April 23, 1986.

(The above mentioned order is handed to the witness.)

MR. COLEMAN: Are you referring here to the third paragraph?

MR. ROMERO: I am showing him the resolution to refresh his memory.

THE WITNESS: In the third paragraph of my order I say.

(Whereupon the witness reads in Spanish from the document.)

THE WITNESS: In English it means, at the moment of approval of the excise tax law most of the wholesalers had not transferred to their clients the totality of the reduction of the oil price due to the worldwide reductions in the price of petroleum. I refer to most of the wholesalers.

BY MR. ROMERO:

Q. You did not read the following sentence in that same paragraph which reads as follows, I am going to translate, if you object to my translation, let me know. This department has sufficient grounds to conclude at least for the trimester preceeding the [162] approval of Law No. 75 that the wholesalers had substantial earnings, higher than the margins considered reasonable for this industry. You referred to all the wholesalers.

A. But that is a sentence in a paragraph. I think you should read the paragraph as a whole and not isolate it.

Q. You said that the wholesalers—the order of April 23rd applies to all wholesalers?

A. Yes because we prefer to adopt a uniform rule and to make a concesion [sic] according to the proof presented to us.

Q. So, you knew then when you signed that order that Tenoco and Coquí, at least, did not have excess profits?

A. Well, I had reasons to believe that probably not, but in the case of Tenoco we never received the whole information. I received information from people like your son, Mr. Andrés Romero who visited me. From the Retailers Association Mr. Rodríguez informed me about this type of participation in the waterborn market. People from my department. But Tenoco, you don't put me in a position to decide in that moment that as a matter of fact they did not receive excess profits. Coquí didn't and as a matter of fact Coquí only violated the rule for a short period of time. It was a very, very brief period of time.

Q. In other words, you presumed Tenoco guilty until proven innocent?

A. I did not have the evidence at that moment to decide.

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[BY MR. LOPEZ—ATTORNEY FOR CARIBE]

[192] Your Honor, let the record show that this is totally a surprise for us. This is the first time that we saw these exhibits. This is not the information provided prior by the defendants. This is—I do not know. There was an order of this Court setting a cut-off for delivering documents and this is the first time I see [193] some documents here. We are in a very difficult position now. There has been a lot of copies distributed among all the members in Court and this is very, very highly sensitive information. And we must request a protective order especially because this was delivered for the first time today. It was beyond the Court's order, the cut off order and we move for a protective order right now.

THE COURT: The cut off order became effective yesterday very late. As a matter of fact, it was filed by me late in the afternoon and I informed you that we were going to give substantial compliance to the order. So, the effective date which I initially established could not be complied with because of the fact that briefs were

filed and decisions were needed. So, as of now Caribe has submitted its case. So actually you're home for all material purposes.

MR. CARLOS LOPEZ: Yes, that is true, Your Honor.

THE COURT: How can you object now to evidence when you have submitted your case? As a matter of fact, you have entered a voluntary dismissal as to other matters.

MR. CARLOS LOPEZ: That's true and this is totally irrelevant to Caribe's case.

THE COURT: It is not being offered against Caribe. Caribe submitted its case on a point of law and against points of law there is no evidence. It is a matter of [194] whether this view is correct or this view is correct.

MR. CARLOS LOPEZ: This is a practical matter. There is some sensitive information spread around to everybody. I do not think the best interest of justice has been served by this.

MR. COLEMAN: Your Honor, may I state the department's views on this?

MR. GONZALEZ: Phillip's Puerto Rico Corp. also objects to this exhibit being admitted in evidence because—

THE COURT: It has not been offered. It has not been offered yet.

MR. GONZALEZ: We will object to it being offered or admitted because it is against Your Honor's ruling of yesterday.

MR. ROBINSON: Your Honor, we originally took the position until this protective order or the ruling on the protective order was issued. We would respect the confidentiality asserted by the Plaintiffs in this lawsuit. So, we filed documents unsealed originally with the Court and included this document which had the full disclosure of everything. But with respect to each of the individual Plaintiffs we showed them only that portion of those documents. We redacted everything that did not per-

tain to them particularly so they wouldn't see other companies' [195] confidential information.

* * * *

BY MS. VIZCARRA: [ATTORNEY FOR COQUI]

[222] Q. Referring to Exhibit 6—

THE COURT: For identification.

MS. VIZCARRA: For identification. I am sorry.

BY MS. VIZCARRA:

Q. Mr. Secretary, that is a summary of the wholesalers gross revenues?

[BY MR. ORTIZ ALVAREZ]

A. Yes.
Q. For the period of January to March 1986, correct?
A. Yes.
Q. You do not know the date in March, do you?
A. Yes.
Q. Which date?
A. In March.
Q. To when in March?
A. The last day of March.
Q. The last day of March?
A. The thirty-first.

Q. Isn't it true Mr. Secretary, that—and I will not go into the information of the other companies, but isn't it true that regarding Coquí, my client, is the only company that does not reflect any excess gross revenues on that table?

A. Yes. Before I issued my order of April the twenty-third the data provided by the companies led me to the conclusion that [223] Coquí did not have excessive profits.

* * * *

[BY MR. ORTIZ ALVAREZ]

[227] A. That is Article 8. I do not recall the specific letter.

MR. MENDEZ [ATTORNEY FOR PHILLIPS]: Your Honor, can we have the Article?

THE WITNESS: The Secretary does not need an authorization from the governor when he has a regulation that contains criteria or the establishment of the order, or the issuance of the order.

THE COURT: Give me one second.

BY MR. MENDEZ:

Q. Mr. Secretary, I am going to show you a copy of Article 8. Will you please indicate under which part of that article, by section and part of the number, you issued the May 20, 1986 order? If I have the correct article.

A. In the second paragraph where it says, "no obstante—"

(Whereupon the witness proceeds to read from the document in Spanish.)

THE WITNESS: In those cases it is not necessary, the public hearing and the—

THE COURT: Let the record show that the Secretary is referring to 3 L P R A 3 4 1 G A, third paragraph inasmuch as he read in Spanish for record purposes.

BY MR. MENDEZ:

Q. So, you interpreted your May 20, 1986 order as an order that sets prices pursuant to that section?

A. Yes.

[228] Q. And that's the same section under which the previous Secretary Héctor Ramos issued the order fixing margins?

A. Yes, I will say yes.
Q. Is that correct?
A. Yes, because Ramos announced the establishment of the margins. He was acting under Article 3 of Reg-

ulation 45. That provides for the establishment of profit margins and also he has the authority to interpret the Regulation 45 according to the terms of the regulation and the interpretation given by this secretary is part of the regulation according to its terms.

Q. The fact is that Mr. Ramos never issued an order and published it in the newspapers pursuant to Section 8 A second paragraph, is that correct?

A. Well, he didn't pay for an advertisement in the newspaper but he announced it in the newspaper. He delivered the press release and it was publishd in all the newspapers.

Q. So that the press release was considered to be the order published in the newspaper although it was not published in the newspaper?

A. I think that is reasonable interpretation of the law. As a matter of fact, everybody acted according to it during two or three years.

MR. MENDEZ: I have no further questions.

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[BY MR. CESPEDES—ATTORNEY FOR SHELL AND MOBIL]

[246] Q. And you haven't looked for any other means of obtaining [247] that information, expenses?

[BY MR. ORTIZ ALVAREZ]

A. But I would like to have the opportunity to face them in a public hearing and they denied me the opportunity.

Q. My question is whether you have any other independent source for the same expenses?

A. No, but I would like a comparison with the United States.

Q. I'm sorry?

A. The comparison between the situation here and the situation in the United States.

Q. We are going to that, Mr. Secretary.

A. Ahum.

Q. For the time being I would like to know, I would like to have an answer whether you have any other source for these expenses?

A. No. I would like to depend on that information after facing the companies and they have had an opportunity. They have a new opportunity now according to the order issued yesterday.

Q. So you issued the order on the basis of these documents that you are referring to, and the documents show you that they are losing?

A. If we apply the 3.6, yes. And in isolated transactions relating to the first three months, if we do that, yes. But I didn't do that.

Q. Is it not what you want to do now is to assume that these [248] companies had great benefits?

A. Yes, they had.

Q. Are you talking net benefits or gross profits?

A. Both, both.

Q. Both?

A. Yes.

Q. You know there is a difference between gross margin and net benefit after taxes, do you?

A. There is a difference, yes.

Q. Do you know whether they could be the same percentage wise or it could be different?

A. The percentage of?

Q. The percentage from sales of gross profits and net sales, is it different?

A. Net margin, you mean, net margin.

Q. Net benefit after taxes.

A. Those are the three concepts, yes.

Q. So you may have large gross profits but you may have losses nonetheless?

A. According to the data that I have it did not have this quarter year. I can explain the data for your company if you want. It is here.

Q. But the data you have shows that they are losing money, are they not?

[249] A. Probably from one point at the end of April and beginning of May because during April they were also making good money. Not as much as in the first three quarters of the year, but they were doing good money.

Q. So, what you're telling me is that you want to erase past profits?

A. Excessive profits.

Q. Excessive profits. With future losses and you don't know the time that it will take to even out what you have termed as excessive profits, is that correct?

A. I think it will be ready by August or September.

THE COURT: Let me ask you something and this I ask you with due respect. Where in the organic act does it state that the department has the authority to determine what are excessive profits for a company in a free enterprise system?

THE WITNESS: Well, we have the authority to define the profit margins of the companies.

THE COURT: Will you please tell me where that is stated here?

THE WITNESS: In Law Number 7.

THE COURT: To determine precisely that?

THE WITNESS: Yes. Section 341. It is Article 6 of the Organic Law, number 5, April 23, 1973. It says, "In [250] addition to the powers and authority transferred by this chapter to the Secretary of Consumer Affairs he will have the power to do as follows; to regulate, to fix, to control, to freeze, to revise the prices of profit margins and other capitals, invest in all the endeavors of marketing over articles, products, services, etcetera."

THE COURT: That's the one?

THE WITNESS: Yes.

BY MR. CESPEDES:

Q. Is there any other source?

A. Also in Law 228 the Secretary has the power—of 1982.

Q. What does it say?

A. It is a general authorization to establish prices, to define profit margins. It is a well known power in Puerto Rico. A lot of products were under the control of DACO by means of fixing prices or by means of definition of a profit margin.

Q. How do you determine excessive profit?

A. Excessive profits is a concept that you develop with experience. For example, the federal authorities thought that benefits beyond 8.6 were excessive and I can compare the situation of Puerto Rico with the situation of similar jurisdiction in the United States. If the wholesaler can survive in Florida, Exxon, Texaco, Shell, Mobil with margins of five cents, four cents, three cents, why the same companies need thirty cents, [251] twenty-five cents, twenty-two cents in Puerto Rico?

Q. Can I tell you? Is that a question?

A. No. That is a conclusion. I am not asking you. You are the attorney, I am the witness.

Q. There is a memo of DACO, Héctor Ricardo Ramos which was not included among the ones your counsel presented and which is not part of the compulations [sic] made by your counsel. It is dated March 30, 1982. It is addressed to the Honorable Gilberto Rivera Ortíz, President of the Commission on Consumer Affairs from Mr. Héctor Ricardo Ramos Díaz, Secretary. Commentaries to the resolution of Senate Number 85 dated 30 March 1982. And you tell me and I will read from it whether you have heard of these memorandums and of these findings. And I will read it in Spanish and then I will translate in English.

(Whereupon the attorney proceeds to read from the document in the Spanish language.)

"Reasons why the price of gasoline in Puerto Rico have been different. In addition of what has been stated before, the high cost of transportation particular to Puerto Rico is another factor that influences constantly between the gasoline price in Puerto Rico and that of the regional sections of the continental United States operates in cost that have been higher in our refinery refining industry." So, you have transportation costs in addition to transportation.

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[BY MR. CESPEDES]

[260] Q. Are you an economist?

[BY MR. ORTIZ ALVAREZ]

A. No, I am an attorney.
Q. Are you a CPA?
A. No but I understand very well those figures.
Q. Are you a financier?
A. I have studied a lot about that but I'm not a financier.
Q. You don't consider yourself an expert in accounting?
A. No.
Q. Nor an economist?
A. But I have learned a lot about economics in this field.
Q. Should I break my question in three? Have you made a study of expenses of major companies in the United States?
A. I'm conducting a study right now.
Q. Have you been able to determine how those companies transport and what their cost is?
A. Yes. I have a design of how they operate through my advisors in the United States.
Q. How do they operate in transportation?
A. By land, obviously. They use trucks.

Q. So, you are not able to tell us because Shell transports it by sea, whether or not the transportation charges here are higher or similar or less?
A. But once again—
Q. Please answer my question, sir.
[261] A. I recognize that what you are raising means that gasoline is more expensive for wholesalers in Puerto Rico. I admit that. It is more expensive in Puerto Rico to buy gasoline by the wholesaler.
Q. Why is it more expensive?
A. Five, ten cents from that of the States. Fifteen cents sometimes.
Q. Why?
A. Because there are transportation costs, there are inefficient operations in the refineries. We have only two refineries. It means less competition at that level. But it has nothing to do with your profit margins. That is a cost for the high price of gasoline in Puerto Rico but it has nothing to do with profit margins.
Q. Where is the column of expenses, is it before gross margin or after gross margin?
A. Expenses of the company?
Q. Have you ever seen a financial statement of profit and loss?
A. Sure.
Q. You know they have sales costs here, gross margin and down below there are the expenses, are they not?
A. Yes.
Q. How can you say it does not matter what the expenses are?
A. The expenses of the company? You can do with your expenses what you want to because if you want to increases your expenses [262] you pay high salaries to your executives, you pay representation expenses to your executives, you use a very inefficient operation. You can do whatever you want with your cost.
Q. You, the Secretary are judging what kind of salaries we ought to pay?
A. No.

Q. This is what you are doing, are you not?

A. What I want to know is why you need a margin that is three, four or six times higher than the margins your company has in Florida, New York and New Jersey. Three times higher, six times.

Q. Have you ever thought of going down below the gross margin to the expenses column?

A. I have looked at those expenses.

Q. Then have you found an answer to that?

A. No. I want the companies to explain it.

Q. So without having that information, except what the companies have supplied to you, you came up with the May twentieth order, did you not?

A. Because the companies did not provide me the opportunity of hearing them. They were invited to a public hearing on May twelfth.

Q. Now, tell me Mr. Secretary, you say that there is a regulation that establishes the 8.9?

A. 8.6.

[263] Q. 8.6. What is the 8.6? Is that a margin and a margin of what?

A. Profit margin for wholesalers.

Q. So, that is before expenses, it is not?

A. Before expenses.

Q. And would you tell us in what order or published regulation is that 8.6 established?

A. It was established by Mr. Héctor Ramos in some public statements.

Q. In public statements he establishes the 8.6?

A. He didn't publish it. It was a special announcement made by DACO.

Q. Therefore, there is no order, is that true?

A. There is an interpretation—there is conduct followed by all the companies. There is an announcement of Secretary López Feliciano last August and there is—as a matter of fact, the margin was finally published on April twenty-third on a whole year basis. If you want to find it published you can see the announcement published in April twenty-fifth.

Q. I will try again, Mr. Secretary. Is there an order in which the 8.6 was established and when was that?

A. It was announced publicly by Héctor Ramos.

Q. Would you answer my question? Is there an order in writing establishing the 8.6 gross margin?

[264] A. Ramos has written extensively to the companies including your company. Especially, your company returned some money as a request by Héctor Ramos.

THE COURT: The answer is that there is no such order. It is simply what they call a historical margin, for some reason. And the reason is that he says that at a given point in time it was used. That's the answer. Am I right?

THE WITNESS: Yes. And it was adopted by Secretary Ramos.

BY MR. CESPEDES:

Q. But its adoption was not made part of a written document?

A. Not with that formality.

Q. With what formality? Was it in a written document, sir?

A. Not as I published my order yesterday. It appeared in the newspapers but Shell, for example, was well aware of the order because as a matter of fact Shell returned some money because they overcharged against the orders of Ramos.

Q. Was it not true that Shell was doing that on a volunteer basis without having any request from DACO?

A. Well, I seriously doubt that the company will be happy to give some money just to satisfy a person. I suppose that Ramos asked for a refund and the company gave it to the consumers.

[ATTORNEY FOR TENOCO]

MR. TOTTI: Objection, Your Honor.

THE COURT: What is the objection?

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[BY MR. CESPEDES]

[269] Q. My question is, other than the financial that you have referred to in your prior testimony you have no operational cost history [270] of these companies?

[BY MR. ORTIZ ALVAREZ]

A. We have some, we have some. It would be unfair to say that we don't and it depends on the companies. Some of them have provided continuous information. Some of them have provided—we have some companies for example, we have a complete record of one company that usually provides information regularly. But there are companies that have never submitted information.

Q. But you have had information and that information has been the companies'?

A. Some companies, yes.

Q. Shell and Mobil, have they submitted them?

A. We have some information about Shell and Mobil. I do not know whether or not it is complete from the whole period beginning in 1981. I do not recall exactly but we have information from Shell and Mobil, yes.

Q. Do you have enough information to feel comfortable in connection with the May twentieth order?

A. No, no. Even with the companies that have provided the most complete information I have some questions to make.

Q. So, you have some information from Shell and Mobil and that information is not enough as far as you can tell?

A. Yes, yes.

Q. Is that the same answer to B, if there are any significant differences between the operational costs of major companies and [271] major companies in the United States?

A. I think that nobody can define that explanation and I want to receive information from the companies because the memo you read has nothing to do with these problems of the difference between the wholesalers margins in the United States and the wholesalers margins in

Puerto Rico. That's the reason why I am asking for information.

Q. Well, it would be fair to state that you don't have enough information in this connection?

A. Well, I had information from my consultants, but I want to know some details about the position of the companies.

Q. You don't have the information of the companies that pertains to major companies in the United States?

A. About the differences between the margins here and the margins in the United States I have asked informally in confidential meetings some of the members of the industry and they have given me details. But I would feel more comfortable if they provided that information in a public hearing.

Q. So that is the extent of the source and information you have, the one you have informally obtained from the members—

A. From the companies about the differences between the margins here and the margins in the United States.

Q. How about the companies in the United States? What sources and what is the amount of information? Do you feel comfortable [272] with the amount of information you have or you need a lot more?

A. I think I need more. This is a continuous process of re-evaluation. We have information that most of the wholesalers in the United States have margins of five cents or less. Some operate with two or three. Even the largest companies, I'm talking about Texaco, Esso, Shell, Mobil, Chevron, Gulf.

Q. Concluding now these questions. Then, is it not your statement that you want the companies to suffer losses to make up for what you have determined as excessive profits, is that a fair statement?

A. I want to provide the means and order process by means of which the market gets ready for a free competition just under the controls of the profit margins. But now, the market is disorganized. The experience of the

first three months showed us that there are differences in this market. So deep as to justify an intervention of the government. I do not want anybody to suffer. As a matter of fact, I provided a margin, a slim margin of profit that will be enough to provide for some of their expenses. And also my order says that I am ready to review the profit margins. They justify it. And it may be—I can do it very soon if they demonstrate that.

Q. What profit margins do you have in mind that they should show you as reasonable?

A. I do not have a figure. Some wholesalers have told me what [273] they think is a proper margin, but I obtained that information in confidential meetings and I think it is not proper to express it.

Q. Is it not the reason for the May twenty order that there were increases since the March thirty-first freeze that you put on the April twenty-third? Were there substantial increases in the price of gasoline?

A. Yes, yes. I recognized that and I have publicly announced it. As a matter of fact, the price of gasoline in the States have gone up and those prices are relevant in our market because the contracts of the companies and the refineries and the imported gasoline are beased on the prices prevailing in the United States, in some markets of the United States.

Q. Is it not also true that in spite of the fact that they have increased significantly you have reduced the 8.6 to 3.6 margin, have you not?

A. As a temporary measure. Just as a temporary measure. If they demonstrate that they meet the margin of twelve or thirteen or whatever they demonstrate, I'm ready to adopt a new rule and to balance the excessive margin of January, February and March with the new margin that we can adopt at any time.

Q. Is it not the only evidence that you have that they are suffering losses at this time?

A. But once again I established, I finally established as a rule [274] the 8.6 margin. It is a clear rule follow-

ing all the requirements of state law. It is clear by this time and I want to have a gross margin near the adopted rule at the end of the year. But, if they demonstrate by means of public hearings or additional evidence that they need additional margins I'm ready to provide it to the wholesalers. But it depends on what they demonstrate in public hearings because I am very concerned with these facts. I think it is a very serious problem because we can justify a higher profit margin in Puerto Rico by some reasons but not as much as six times the margin prevailing in the United States. I think that it is unjustified. Probably you can justify an increase and I am ready to approve that if you can convince me.

Q. So, what you are telling us is that you are retroactively trying to establish an equality by—

A. For a whole year, yes.

Q. The year has not passed. We are in May.

A. Yes.

Q. You are retroactively punishing the companies for excessive profits, is it not that?

A. What I want is to balance the profit margins for the whole year. If they continue in the same way they were in the first three months of the year, the profit margins at the end of the year will be twenty—twenty-five.

* * * *

[BY MR. ORTIZ ALVAREZ]

[281] A. 3.6 if beginning today is not enough, but we have to begin on January the first.

[ATTORNEY FOR TEXACO]

MR. DOMINGUEZ: I have no further questions. Thank you.

THE COURT: Any additional cross examination by the Plaintiffs?

MR. SANCHEZ: Your Honor, I would like to have a couple of questions asked to the Secretary in view of the—

THE COURT: Please go ahead.

CROSS EXAMINATION

BY MR. SANCHEZ: [ATTORNEY FOR ESSO]

Q. How can we define, according to the Secretary of the Department of Consumer Affairs, what is an excessive profit margin?

A. One that is beyond the margin authorized by the department.

Q. And what is the margin authorized by the department?

A. 8.6.

Q. When was it authorized by the department?

A. It was authorized first by the federal authorities in 1981.

Q. Until January twenty-eight 1981.

A. But it was rebilled by President Reagan because Reagan observed that most of the wholesalers were having margins below the limit established by the federal government and he decided to eliminate the controls. The day after Mr. Ramos called the press and announced to the public and to the companies, to everybody, that he was freezing the controls that were imposed by [282] the federal government.

Q. That's on January twenty-nine?

A. Yes. That is my recollection. Probably the papers will help us to get the precise facts.

Q. And you are an attorney, Mr. Ramos?

A. Excuse me?

Q. You are an attorney?

A. Sure.

Q. How could a person effected by that decision—when did the term to file a petition at the Superior Court begin for that person with regard to that public statement made by the Secretary?

A. I think you are misinterpreting the process to review the decision of the Secretary. It was providing a rule, acting in a quasi-legislative manner. You don't have to appeal the quasi-legislative announcement of the Secretary. It was not in the context of an adjudication. If it is a common misunderstanding but when you are effected by a decision when the Secretary is acting as a quasi-judicial officer, you have to go with the Court, within the defined period of time. But the definition of the rule could be attacked at any time.

Q. And they could have been attacked whenever the Secretary authorized that rule?

A. Sure.

Q. And you said that all the companies abided by that rule?

[283] A. Well, most of them and probably one didn't. But most of them by my papers show that there was substantial compliance.

Q. In the case of Esso, do your papers show which were the profit margins for Esso as of February first, 1981?

A. I would have to check my papers. I do not recall specific—

No, no, I do not have a copied letter here from Esso.

Q. In the examination of your records were you able to determine which were Esso's profit margins from 1981 to 1985?

A. Héctor Ramos' conclusion was that all the companies were below the 8.6.

Q. No, I am asking for your conclusion before adopting the April twenty-third order or the May twentieth order that is the one in issue here?

A. I relied on Héctor Ramos' conclusion for those three years because he was the person authorized by law to take decisions and he announced publicly and i [sic] supposed he was telling the truth.

Q. So, you rested your criteria to reaffirm the 8.6 margin on whatever paper clippings you had from the expressions of Mr. Ramos?

A. Sure about the compliance of the rule? Yes, I take the word of Mr. Ramos as the truth.

Q. Is there any official document in the department, an official document to which we may pinpoint and say, "this is when Mr. Ramos officially said this." A document of the department, do you have [284] that?

A. No, I haven't seen it as such. We have things, press releases, public announcements, letters to the companies, memos. He said that—as a matter of fact, we found a presentation made by him to the House of Representatives and it was submitted by one of the companies who learned about that in a public hearing, submitted it and—as a matter of fact we recently held public hearings in January regarding the gasoline industry and some of the companies talked about the margin, 8.6.

MR. SANCHEZ: May we use the blackboard for some illustrations?

THE COURT: Please go ahead.

MR. SANCHEZ: Just to see if we may understand for the record the basis of the decision made by Mr. Ortíz. Starting from here, .1 until .10. And let's say this is the origin of the product that will be eventually the gasoline and this is the sales price to the consumer.

BY MR. SANCHEZ:

Q. There is what you consider a cost of acquisition of the product.

A. Yes.

Q. And to that is what you determine that the reasonable margin was 8.6?

A. Yes.

• • • •

[BY MR. ORTIZ ALVAREZ]

[286] A. Yes, as a temporary measure.

[BY MR. SANCHEZ]

Q. When does the temporary measure end?

A. It is a temporary measure and I consider that it would be enforced for two or three months. No more than that time. That is enough time to adjust the market.

Q. Do you have a specific criteria to determine for how long you are going to enforce it?

A. I will hear the companies in the public hearing. I will receive new evidence if they want to submit new evidence and I will decide soon after the June second public hearing, which is the proper profit margin. Probably we have to make adjustments. I agree with that. Probably we should adjust—

Q. As of this date, let's say yesterday, you did not have a specific criteria as to when or until when you were going to set that 8.6 margin or whatever margin?

A. I have a criteria. I know the margins in the States. I know that the interest rates today are lower than in 1981. I know that the price of gasoline is lower than in 1981, but on the other hand I know that—and the expenses announced by the companies are more than they announced three years ago. I would like to know the reasons for the increase.

Q. Do you have any evidence as to the information that Esso has submited to you as to determine that something which they have submitted to you is false? Do you have that information?

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[BY MR. SANCHEZ]

[289] Q. But suppose that the eleven cents is true, would the excessive [290] profits for Esso, would it have been from the eleven cents on or from the 8.6 on?

[BY MR. ORTIZ ALVAREZ]

A. If they demonstrate that they have legitimate expenses of eleven cents and it is not caused by inefficiencies in the market and that margin is indispensable to survive in this market I am ready to define a new rule. This is a temporary measure.

Q. But the problem is not defining the prospective rule. We are dealing now witj tje [sic] conclusions made by the Department that they were—

THE COURT: Let me once again intervene. I think that we are going around the bush. What you are saying when you answered the questions posed to you by Mr. Céspedes, what you have done is that you have used a subjective analysis, so to say, rather than an objective, to determine the way in which according to the Department's view, what you understand are excessive profits, had to be adjusted on a temporary basis until the matter was finally solved?

THE WITNESS: Yes.

THE COURT: That's it.

THE WITNESS: But it is not a subjective view. It depends on the fact that until 1983 according to the finding of the former Secretary Ramos, the wholesalers had margins below 8.6 and the fact that the same companies in the States had margins below the 8.6 and the fact the same companies [291] in Puerto Rico were having margins less than 8.6.

THE COURT: But the truth of the matter is that you don't have the objective studies as your order of May twentieth appears to admit at page eleven, letters A through D, inclusive to determine with precision what is it that motivates these phenomenons?

THE WITNESS: We have considered the difference in the expenses that they had until 1983 and the expenses they are expressing until 1985-1986. We have found nothing to justify any such increase because there have been no significant increases in the salaries of labor, and there have been no increases in the price of gasoline. It is in the other way. No increases in the interest. For example, in 1981 the prime interest was over thirteen. Now, it is 8.5.

THE COURT: In other words, you have leads, you have pointers, but you don't have objective evidence because that has not been developed. Am I right? You

cannot conclusively point to this area A, B, C, D are the problem areas. You just can't do it. You want to do it but you can't do it today?

THE WITNESS: Yes, because I was depending on the public hearing that was held last Monday and most of the companies did not attend.

[292] THE COURT: So, irrespective of that situation you are in agreement with me that it is impossible for you to point out exactly what the problem areas are today?

THE WITNESS: Yes. Probably if the companies had attended the public hearings, had they come to the public hearing last Monday I would have been able to define a new margin. But, I have to accept the margin established by Ramos because the objective circumstances around the market now leads me to conclude that there are no substantial reasons for such a substantial increase in the margin because when Ramos said that the 8.6 was reasonable, the prime interest was thirteen. Now it is 8.5. The electricity was higher than it is now. Gasoline prices were higher than now, labor was increased but not so much. And the experience in the States demonstrates that the efficiency of the market has conducted the company to margins of less than five cents. And there might be a problem of efficiencies in the market and probably companies are probably having higher expenses due to inefficient operation.

THE COURT: I think I got the same answers. So let's move to another point.

BY MR. SANCHEZ:

Q. Mr. Secretary, which state of the United States has a regulation regarding the gasoline prices as of today?

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[311] by mr. romero [sic]

q. You have testified that the documents that are included in that notebook—would you look at your list?

[BY MR. ORTIZ ALVAREZ]

A. Yes.

Q. Look at documents number one, two, three, six, eight, sixteen, twelve, fourteen, sixteen, twenty-one and twenty-two. Were all those documents that you had before you when you issued the order of April twenty-third 1986?

A. Yes.

Q. Is that correct?

A. Yes.

Q. You have no doubts about that?

A. No. Those documents are in our files.

Q. Have you examined them carefully?

A. I read most of them directly or by means of reports submitted by my aides.

Q. And you used them in your determination?

A. When I said I, I mean myself and the members of my staff. Probably some of the letters were read by the members of the staff and reported to me. As you know, the Secretary has not very much time to read all the documents in the department, but I depend on the reports submitted by the members of the [312] staff and some of those documents were carefully studied by the members of the staff.

Q. For the April twenty-third decision some or all of them?

A. Well, if you mean about the establishment of the 8.6 rule, I depended on the evaluation and interpretations made by the officers of my staff.

Q. You testified on questions from your attorney's questions that you had these documents?

A. Directly or by means of a report.

THE COURT: Is there an objection?

MR. COLEMAN: Yes, Your Honor, I object. The question earlier was that document one, two, three, and six were before the Secretary and were part of the things that he had considered. The newspaper article and that sort of stuff was not necessarly [sic]—at least in my question didn't ask him if that was part of the basis that he relied on to make that decision.

MR. ROMERO: I am sorry.

BY MR. ROMERO:

Q. One, two, three and six you had before you?

A. Directly or by means of a report or oral report, or written report from one of the officers of the department.

Q. Will you take a look at nimber three?

THE COURT: Without getting into the details for the [313] time being.

BY MR. ROMERO:

Q. Just look at the top part there where there are some initials and the date. Would you indicate whose initials those are and what the date is?

A. Are you referring to Exhibit number three?

Q. Number three.

A. Yes, I have.

Q. Whose initials are those? Are those Carlos La Santa's, are they not?

A. Yes, La Santa prepared that document.

Q. And those are his initials?

A. Probably, probably, but he presented it to me.

Q. And there is a date there?

A. There is.

Q. 5/9/86?

A. Yes sir but it is a recollection of the data that we had since March, at the beginning of April.

Q. But you did not have this document before you April twenty-third?

A. Not exactly this document.

MR. ROMERO: That's all.

THE COURT: Now we are going to go finally to Mr. Coleman.

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May 22, 1986.

[59] BY MR. ROBINSON: [ATTORNEY FOR DACO]

Q. Mr. Romero, during 1985, could you tell us generally how your prices related to the prices of your competition?

[BY MR. ANDRES ROMERO—TENOCO]

A. I do not have that information, no.

Q. Could you tell us generally whether it was generally three cents, four cents, ten cents, 15 cents lower than your competition?

A. It is lower, considerably lower.

Q. How much lower? We are talking about 1985.

A. I do not know. It is very hard to determine our competitors prices in 1985 because our competitors had an incentive program where they gave to some retailers a higher incentive than they gave to other retailers.

So to pinpoint the difference so we can understand the difference between one retailer and the other retailer—somtimes in those instances there were 12 cents differences. So, it is hard to pinpoint what advantage I may have had. It is difficult.

Q. Let me ask you this question, then. You had a cost of gasoline, the cost that you paid Phillips for gasoline, is that right?

A. That is correct.

Q. And you testified earlier that you—

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[BY MR. ANDRÉS ROMERO]

[63] A. You try your best to be below and you get the feeling from your customers. They will say it is too high. So, you try to look where you can reduce.

[BY MR. ROBINSON]

Q. So, your customers will let you know?

A. Yes. Your best indicator is your customers.

Q. In 1985 was your best indicator telling you that you were selling below your direct competition?

A. Yes.

Q. Now, going into 1986—December, January, February and March, the period covered by your Exhibit 3. During that period did you continue to use the same policy to establish your prices?

A. Our customers, yes.

Q. No, no. I am asking you during that period if you used as your base for determining your selling price, Phillips price, the excise tax, the transportation and two or three cents?

A. No.

Q. You changed the method?

A. Yes.

Q. What did you change to?

A. I changed it to follow the prices of the competitors. Not to follow, to maintain a distance with my competitors.

Q. Maintain a distance. What difference was it that you were trying to maintain?

A. It depends on the moment.

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[BY MR. ANDRÉS ROMERO]

[79] A. Yes.

[BY MR. ROBINSON]

Q. Now, the comparison of these two, am I correct in comparing these two, for example on that day, your price

to the retailers was 73.5 and the price of let's say Texaco was 86.8 cents a gallon?

A. On one of these figures, yes, there is a difference.

Q. In other words, you were on that particular day, you were at least 13 cents below Texaco?

A. That is correct.

Q. Now, in 19—

[ATTORNEY FOR TENOCO]

MR. ROMERO: Let me call the attention to Brother Counsel and the Court that the lower part, the prices to the consumer, the lower part, the "cost to retailers", it says that the incentives are not included. Just for the purposes of the record.

THE COURT: That is correct. That is what it says.

MR. ROMERO: The witness is testifying what it appears to him, but the document speaks for itself.

THE COURT: Yes. I understand also the point that you want to make, Mr. Robinson.

BY MR. ROBINSON:

Q. Now, were those kinds of differences that are reflected in the numbers shown on Exhibit 28 and 29, were those kind of differences prevalent in 1985?

[BY MR. ANDRÉS ROMERO]

A. I said it is hard to establish the 1985 because of the [80] incentives.

Q. In 1985 there were incentives too?

A. There were incentives, larger than in 1986. The incentives that are now, I think, are controlled. Before they used to be 15 cents, 18 cents. This year I do not know exactly when, but I understand that it was eliminated.

Q. Now, let's go back to Exhibit—I have lost track of the number. It is this one.

A. 29?

Q. The hand-made graph—

THE COURT: That's your Exhibit 27.

BY MR. ROBINSON:

Q. That graph shows a—it also shows in one of the exhibits, it shows a substantial increase in sales volumes in January, February and March, and even in April of 1986. In your opinion does that have, does that increase have anything to do with the fact that your price spread between your own clients and that of your major wholesalers competition substantially increased during that period?

A. Part, yes.

Q. In your opinion would it have a substantial effect?

A. Yes, it would.

Q. Now, you had went from roughly 2.2 million in December to a few months later you were up to roughly 4.7 million, which is more than double. Did the consumption of gasoline generally in [81] Puerto Rico increase by that amount in Puerto Rico or did it remain relatively constant, if you know?

A. I have no idea. I have no way of knowing.

Q. Tell me, in your sales to individual stations you had in December of 1985, you had individual station customers and I assume you still had most of those in March of 1986, three months later, and you are still selling to the same people, correct?

A. Yes.

Q. In your sales to these individual stations, did your sales to individual stations more than double during that period?

A. I could not answer that way, but I can answer you this. That when the incentive program was limited or reduced my sales had drastically changed.

Q. Substantially increased?

A. Yes. The stations that used to sell 40,000 were now selling 80,000.

Q. Your stations would sell 80,000?

A. Yes. The ones that were selling 40 were selling 80. There was an increase overall throughout the new clients.

Q. Now, can you try to pinpoint in time for us when it is that your understanding that this incentive program was continued or substantially reduced?

A. Around December, around there.

Q. Around the end of the year?

A. I guess. I don't know. Based on the operator—

[82] Q. It changed roughly without being held to a date, December of 1985?

[ATTORNEY FOR TENOCO]

MR. ROMERO: Your Honor, it is hard to—it is obvious that the witness does not really have the facts.

THE COURT: He is giving us his best recollection, his impression.

MR. ROBINSON: And I take it as an impression, thank you.

MR. ROBINSON:

Q. Now, did you increase the number of people that you were selling to? Did you take on new customers during this period?

A. Yes.

Q. A substantial number of new customers?

A. Directly and indirectly, yes.

Q. You indicated that there are two classes of customers that you sell to. Mainly, I assume from your previous definition, that you sell to some jobbers and you sell directly to retailers, retail stations, is that correct?

A. Correct.

Q. Let's take 1985 again, just looking for a rough number, what percentage of your sales to jobbers and what are the percentage to retail stations. And please, sir, I am not asking for exact percentages. Just in general terms the relationship of the two. Was more than half retail stations?

A. No, no.

[83] Q. Let me ask you a question so I'm sure you understand. Were more than half of your sales in 1985 to retail stations as opposed to jobbers?

A. Yes, yes.

Q. Could it be more than three-quarters?

A. It is around there, I would say. I could get that—

Q. I'm not going to hold you to anything. I'm just trying to again get the general relation.

A. It is around there.

Q. Has the relationship remained approximately the same into the first—through the first three months or four and a half months of this year?

A. Yes. I would say, yes. It has maintained that same—

Q. Thank you. Now, did you pick up a lot of direct retail customers from January 1st to, say, April 1st of this year? New retail stations?

A. I had a steady increase of new customers this year.

Q. And who are these customers? Who had these customers previously been served by, other wholesalers?

A. Yes.

Q. Did they ever express to you the reason why they were switching to you?

A. Yes.

Q. What was the reason?

A. The price.

[84] Q. Now, how about jobbers? Did you pick up new jobbers during that period, January 1st to April 1st, 1986?

A. No new jobbers. I don't think so. I think they were already with me.

Q. Did your sales to the jobbers, your jobber portion of your market increase?

A. Yes.

Q. To your knowledge did they pick up new stations?

A. To my knowledge—it is difficult. I know their volumes increased. I do not know how or—

Q. The answer is that you are not certain?

A. Yes.

Q. Now, since April 1st, have we seen these numbers go in the other direction? That not only the sales volumes have gone down but have you also lost retail station customers that you no longer service that you were servicing in the first part of the year?

A. Not many. I can't offhand think of a particular situation, but I can tell you that their volumes and the constant preoccupation is that their volumes have decreased considerably.

Q. The volumes they purchased from you decreased considerably?

A. That is correct. And I can state four or five stations right off my mind that were selling 100,000 gallons of gasoline and they dropped to 40,000 gallons.

Q. Why don't you give us four or five off the top of your head?

[85] A. There was a station in Caguas, there was a station in Arecibo. Also there was a station in Las Piedras. There is a station in Utuado.

Q. That's good enough. Now, at these particular stations they substantially decreased their purchases from you, is that correct?

A. Yes.

Q. Since April 1st?

A. Correct.

Q. You are generally familiar with the gasoline business on the island and you live here and you are generally familiar with what goes on here. To your knowledge has anything happened since the first of March which would—or the end of March which would suggest to you that people are buying generally less gasoline than before that time? Is there anything that suggests to you that the total demand to gasoline in Puerto Rico has decreased since the first of April?

A. I do not think so.

Q. Did the stations that substantially reduced their purchases from you, did they tell you why they were doing that?

A. Yes.

Q. Why?

A. Their competitors are posting the same prices as they are.

Q. The same prices?

A. Yes.

[86] Q. So they decided to switch to a competitor because he had the same prices you did?

A. Yes. We on a normal basis, the success that we have had throughout 1985 and 1986 is that our stations, when I say, "our stations" I mean the stations that buy from us, can maintain at least a one cent differential from the majors.

Q. Is that because your gasoline is not as good?

A. No, because I would say it is because the stations are not as pretty, do not have the new equipment, do not have advertising behind it and they only have two pumps and one servant. So, in order to—I guess the consumer with the same price could enter into a prettier station. There might be a factor of security. I can't tell you but our—we have had—at least our experience is that as long as we can maintain a one cent differential there is hope for the small retailer.

Q. Now, we are talking about a one cent differential. Is that the kind of differential you need in today's marketplace to—

A. That one cent per liter represents four cents.

Q. I see.

A. Per gallon.

Q. Do you sell to retail stations that also purchase from other suppliers? In other words, they mix your gas in their tanks and sell to customers your product plus other people's product?

A. I don't think I understand.

* * * *

[164] BY MR. COLEMAN

Q. Are you aware of whether in recent years there has been some deficiency achieved in the marketing of gasoline?

[BY MR CARLOS LASTRA—ECONOMICS EXPERT FOR CARECO]

A. In what respect deficiencies?

Q. I mean—you would agree that this is a dynamic market that changes all the time?

A. Yes.

Q. Have you noticed that in recent years you have some very large retail service stations with a number of pumps and most often they are owned by large oil companies? Are you aware of that development?

A. In Puerto Rico?

Q. In Puerto Rico and anywhere else?

A. I am aware in Puerto Rico, yes.

Q. You have seen a number of those stations now?

A. I see some, yes.

MR. ROMERO: May it please the Court.

I don't know if Mr. Coleman is aware or not that since 1978 no new companies—the companies cannot purchase new stations. Whatever stations are there were before the facts of this case. So, that's not a new development. It is something that was there before.

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[206] THE COURT: I'm going to overrule the objection because I am confident that the witness understands the question and he can answer if he can answer, and if he cannot he will tell the attorney that he cannot deal with it.

[BY MR. ARMANDO PEREZ—ESSO]

THE WITNESS: I cannot answer the question.

(Laughter.)

MR. ROBINSON: I said at the beginning that you were good.

BY MR. ROBINSON:

Q. Now, are your operating expenses going up or down?

[BY MR. ARMANDO PEREZ—ESSO]

A. As it relates—generally they are going up.

Q. Are they going up on a per gallon basis? That is, is the 11 and a half cents now, is it over the course of the last two years? For example, has it gone up over that period?

A. Since 1985 it has not. We have had to take a number of measures from an efficiency standpoint to maintain them at that level. But obviously it is very difficult to increase your volume base in a competitive business like this. Your only real option is to reduce your expenses and develop efficiencies. And up to the moment we have been as efficient as we can be.

Q. I have been reading in the newspapers lately that Exxon has announced that its worldwide operation, because of the oil market, will reduce employees by 25 percent. Is that going to apply to Puerto Rico?

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[269] [BY MR. CESPEDES]: Q. Your Honor, we will offer it not on its contents, but on the fact that it was offered on the terms and paid for by Shell, on the terms of what the Secretary responded, on the deregulation purpose of the Secretary at the time.

MR. COLEMAN: Your Honor, I rely on your percolator.

THE COURT: Very well. If you are going to rely on my good sense in this matter I'm going to rule as follows.

Pursuant to Rule 105 of the Federal Rules of Evidence I'm going to admit that evidence for the limited purpose, limited purpose of showing that it was published period. Once again, I am not going to decide this case on the contents of newspaper clippings. It would be an irresponsible act on my part to do so.

MR. CESPEDES: And we were not intending it as such, Your Honor.

BY MR. CESPEDES:

Q. Going back to the period of January through March, 1986, what, if anything, of significance happened in that period of time?

THE COURT: Before you proceed, Mr. Coleman, do you have any objection as to the admissibility as limited?

MR. COLEMAN: No.

THE COURT: Please proceed.

BY MR. CESPEDES:

Q. What, if anything, of significance happened in the gasoline [271] market?

[BY MR. FRANCISCO FORTEZA—
SHELL and MOBIL]

A. Well, obviously the prices, the petroleum prices as well as the crude oil, started to fall down in December and I feel confident in saying that they came crashing down in the first 90 days of 1986. And this was obviously felt by us as an importer and buyers of local materials. Therefore, our prices to our customers started to reflect a sharp decline. The first decline came in the first of January and followed through March the 12th to the tune of some 39 cents per gallon.

THE COURT: You will have to explain it to me again because I lost you.

THE WITNESS: Your Honor, the prices of petroleum product as well as crude oil started declining at this most significant part of the very end of December. And they came down very quickly during the January, February, March period, and as we were importing the materials and the tankers came in with significantly lower prices, we then passed this price as a reduction in sales price to our customers. And we did this in six or seven steps as the tankers came in.

In total amount our selling price was reduced from the 1st of January to the 12th of March, it was to the tune of 39 cents a gallon.

THE COURT: The reduction?

THE WITNESS: Yes, Your Honor.

THE COURT: From January the 1st, 1986 to—?

[272] THE WITNESS: March the 12th. We were also considering at that time in the following days to pass on a further reduction of about five cents a gallon, but by that time it was very evident that we would be faced with an import tax.

So, we decided to withhold that reduction inasmuch as we knew we would eventually have to pay that money to the government.

BY MR. CESPEDES:

Q. Did you explain to the Secretary in the number of visits you had about you having passed to the retailers the reduction?

A. Of course.

Q. What did he say, if anything? What was his reaction?

A. His reaction was that we had passed on a very large amount to the consumer which was equivalent to the reduction almost penny by penny, if not slightly more than what the crude price had been reduced and the gasoline price had been reduced.

Q. But what was his reaction? Did he like that? Did he take it as information?

A. Well, I mean his reaction was that he told me that yes, we realize now that you have shown us evidence that you have passed on as much of a reduction as you possibly could have done in that time period.

Q. That was his statement, more or less?

A. To that tune, yes.

Q. Could you have passed through a high decrease to retailers [273] during March?

A. I mentioned before, that we would have passed approximately five cents in addition to the 39 cents, and that reduction would have been post the March 12 date which was the reduction we offered our customers. We decided against it because it was obvious that we would have an import tax to be faced with and we didn't pass it on.

Q. The Secretary has stated in this courtroom that Shell and Mobil had excessive earnings throughout this three-month period. What is your reaction to that?

A. Well, I do not think they have been excessive earnings. I think that in a declining market the tendency is to make a higher profit than you normally do. I think that what has happened in the last three months is something that, at least in my 26 years of experience in the petroleum industry, I have never seen before. I don't think very many people in this world could have predicted the price of gasoline would drop the way it did. And the price of crude oil would suddently[sic], in the span of 90 days, come up from 38-30 to almost nine dollars a barrel. And the evidence that it is an isolated period is that right now while gasoline at one time cost 39 cents in one specific shipment now costs 53 and while crude oil was being offered at nine dollars a barrel, the New York Mercantile is quoting 17 dollars a barrel from what we know.

You will be eventually seeing crude oil stabilizing [274] around the 20 to 22 dollars. Maybe in six months, nine months time. Certainly, gasoline is going up and up. Even the numbers continuously would say that probably we would be faced with an additional five cent a gallon increase in gasoline within the very short future. And this is due to the driving season. It is a seasonal product. It is an open market in this case.

Q. What criteria does Shell/Mobil use now to set a price on gasoline?

A. The criteria that was working on an idea of a free market was that you have to be competitive, ob-

viously. You pay for acquisition costs, you take into account operating costs, you take a fair return to your shareholder into account, which in turn gets translated into a reasonable gross margin. You try obviously to reduce your cost as much as you can. You try to be what is known in the industry as a lean marketer. It means that you are operating at a least possible cost to be able to reflect competitive prices to the consumer. And this is more so in the Puerto Rican market, which is a highly competitive and very price-conscious market. It is a standard market. There is no more growth in this market.

Q. Do you feel that—how do you determine a reasonable return on investment? What is your policy, what is your guideline, Shell/Mobil's?

A. I feel that you have to put yourself in the shareholders' shoes. I mean this person invests one dollar and he certainly [275] wants something for it.

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May 23, 1986

[51] MR. CESPEDES: I would like to know the purpose for which he is offering. We have established he is not an expert. If he prepared it, then it is prepared by a layman and the fact that the Legislature or the Secretary may have relied on a non-expert summary of the matters, that's their problem. But, this Court's problem is another one. Whether it is going to take this analysis as evidence in this case to judge the [52] prices on the basis of the accusations of the Secretary. So, I move that for the purposes of this Court to judge the propriety of the actions of the Secretary, that document cannot be admissible on that basis, because it was prepared by a layman and not an expert. The fact that it has been used by others, that's fine. But what this Court has to do with it is different.

THE COURT: Any additional objections?

MR. GONZALEZ: Your Honor, we object also on the same grounds.

MR. SANCHEZ: Since it has been raised, what the purpose of the document that was submitted into evidence is, we would like to know and make our objection.

THE COURT: What is the purpose of submitting this document into evidence?

MR. ROBINSON: I am happy to respond to that. I sit here thinking sometimes that we are losing sight entirely of what this case is about. This case is not about—the key issue in this case, that determines the outcome of this case, is not whether the facts are that the prices or the margins increased to certain levels or went down to certain levels and so on. What this case is all about is whether or not these plaintiffs' constitutional rights were violated. And it seems to me that the job before this Court is to consider whether or not there was a decision, whether that [53] decision-making of the agency was in compliance with due process, was in compliance with the amendment of the constitution dealing with taking without just compensation, and whether or not the regulations were pre-empted by the federal regulations. This is not a judcial review of agency rule-making. It is not a determination of whether it is reasonable or unreasonable, etcetera. It seems to me that it is appropriate for this Court to know when this agency made decisions and determining whether due proces was violated, whether or not this agency had information in front of it when it made its decision. And if so, what that information was.

It may be bad information, it may be good information. It just seems to me like the Court is entitled to know. So, that's all we are offering it for. It is to show that the Secretary of DACO, when he made the decision, had certain information in front of him.

The plaintiffs are entitled to cross examine this witness and to determine whether it was bad information, if that's what they want to determine. We are just putting it in evidence so the Court has a record of what the Secretary had in front of him.

THE COURT: So, what you're telling me is that you are offering this document under Rule 105 of the Federal Rules of Evidence for the limited purpose of showing that this document was prepared and used by the Secretary and was shown [54] to the Legislature in the context of this proceeding, and with no other purpose. Is that correct?

MR. ROBINSON: I think that is a correct statement, Your Honor.

THE COURT: If that is the case I will make a limited admission of the document under Rule 105 of the Federal Rules of Evidence to show precisely what I stated before.

That is, that the document was prepared by Mr. La Santa, the same was given to the Secretary and the same was made available to the Legislator, Legislature. The record should reflect that the document would not be admissible on the evidence that I have before me as a summary under Rule 1006 of the Federal Rules of Evidence.

Aside from that, for that limited purpose, I have admitted the document. It will be marked as Exhibit 1. We will mark them in my book. This needs a label.

(Whereupon Exhibit 1 for Defendant is marked.)

MR. ROBINSON: Your Honor, just as a matter of housekeeping, the witness has a book of documents, of the exhibits, so if the Court could hold on to the exhibit that would be fine with me.

THE COURT: It is already labeled in my book.

THE INTERPRETER: If that is not going to be used, it would be helpful if I could have—

THE CLERK: I need these for marking.

[55] THE COURT: Are you in agreement now, Mr. Robinson, with the ruling of the Court? Is the ruling in line with your request?

MR. ROBINSON: We think that's the purpose for the issues that are before the Court and we are satisfied.

THE COURT: Thank you. The record shall so reflect. Please proceed.

BY MR. ROBINSON:

Q. Now, Mr. La Santa, I call your attention to Exhibit No. 2 marked for identification.

Mr. La Santa, did you prepare this document or was it prepared under your supervision and direction?

[BY MR. CARLOS LA SANTA—FOR DACO]

A. I prepared it directly.

Q. And would you identify it for the Court? Would you identify what document this is?

A. This document is a comparison of estimated gross margins for the sale of gasoline for several wholesale companies during the quarter from January to March, 1985 through 1986.

Q. And where did you get the information to prepare this chart?

A. I obtained the information from some documents that had been submitted to the Department by some of the companies. And in order to have the framework of the four companies I estimated four periods—I estimated some periods. I estimated for [56] the month of February and March exclusively for the companies Shell and Mobil.

• • • •

[62] THE COURT: If you want to change your petition—

MR. ROMERO: Yes, Your Honor. As far as I am concerned I will admit it for that purpose, that that is one of the four documents that the Secretary of DACO testified yesterday that he had before him to issue the orders of April 23rd and April 29.

MR. ROBINSON: Your Honor, I would like to move that it be admited under Rule 105 for the limited purpose of showing what was before the Secretary.

THE COURT: Since the purpose for which you are offering it now is different, I will admit this document as Defendant's Exhibit No. 2 under Rule 105 of the Federal Rules of Evidence within the limited purpose of allowing that this document made by Mr. La Santa was a document utilized by the Secretary in arriving at his orders which are the object of this litigation.

But the record should reflect very clearly that the only extent to which I am admitting this document, inasmuch as the same does not qualify as a summary under Rule 1006 of the Federal Rules of Evidence.

MR. ROBINSON: Your Honor—

THE COURT: Proper foundation for the admissibility under Rule 1006 has not been laid.

MR. ROBINSON: We accept the Court's ruling. And if we can, I would like to interrupt Mr. La Santa's testimony.

• • • •

[BY MR. ROMERO]

[118] Q. So that means then your predecessor, Mr. Hector Ramos and Mr. Diaz and yourself opted not for controlling prices but for keeping a watchful eye on prices?

[BY MR. CARLOS LOPEZ FELICIANO—FORMER SECRETARY OF DACO]

A. Based on the profit margin as a guideline to protect consumers. That was the policy adopted by former Secretary Ramos and I followed it.

Q. But it was a monitoring. You had no specific order of controlling prices?

A. There was a policy, an initiative policy of doing that way in order to protect the consumers of overpricing and so on.

Q. And you dealt on a case by case basis?

A. No. We are in the understanding that this profit margin was reasonable and all wholesalers were following them.

Q. Listen to my question. There was no price order establishing those those maximum benefits?

A. Not an order. There was a policy, an administrative policy or ruling.

Q. There is a difference, is there not, Mr. Lopez, between controlling or fixing prices and monitoring an industry?

A. We didn't fix any price on wholesale level or retail level. But we recognized the same policy that former Secretary Ramos recognized to monitor and have a surveillance in order to avoid any excess over the reasonable profit [119] margins of 8.6 on wholesalers and 17.7 on the retailers.

Q. In other words, what you used, Mr. Lopez, was your persuasiveness, elbow bending, arm twisting, "Now, boys, behave", type of attitude?

A. We did the same that former Secretary Ramos did because we thought it was the correct way to protect consumers.

Q. Believe me, Mr. Lopez, I think it is a good policy. I just want to state it clear for the record that there is a difference. The record here might be read by other people who are not here if one of the parties does not like the decision. So we have to make that clear. That's what I am trying to do.

The thing is that there is a difference between a mandatory and a voluntary cooperation of the parties and the arm-twisting of the Department and the other one is the controlling of prices and the fixing of prices and the imposing of penalties when they don't obey those controls. Is that not correct?

A. Yes, sir. For example, the retailers, they accepted all the way the profit margin of 17.7 cents per gallon. I remember that there is some correspondence of some conditions which they accepted the validity of this profit margin of 8.6 for wholesalers as reasonable. And to the best of my knowledge, I remember some letters of some of the companies, maybe Shell or the other of the wholesalers.

[120] Q. Now, you have stated, and it has been stated also by Mr. Lopez Ortiz Alvarez, the present Secretary of DACO—

THE COURT: Excuse me one second.

BY MR. ROMERO:

Q. In order to establish the policy, your mandatory policy, you base that on the authority also of Regulation No. 45?

A. That's right, sir.

Q. Do you have Regulation No. 45 with you?

A. No, I don't think so.

Q. I'm going to supply you with a copy. Let me take the exhibit so we are clear on this.

THE COURT: Exhibit 7?

MR. ROMERO: Yes, Your Honor. I am showing the witness Exhibit 7.

BY MR. ROMERO:

Q. Is there anything in that regulation, Mr. Lopez, that talks about a gross margin of profit of 8.6 cents for wholesalers and 17.7 cents for retailers?

A. No, sir.

Q. How did you decide to then determine how to calculate the gross profit margin? What things did you take into account?

A. What we did was after I received the report from the economic division and—

• • • •

[131] [BY MR. GONZALEZ] [CARECO]

Q. What was the purpose of that study? To determine whether there were violations of the 8.6 profit margin or was the purpose to determine what were reasonable profit margins?

[BY MR. LOPEZ FELICIANO]

A. The purpose was to determine if they were exceeding the profit margins of 17.7 and 8.6.

Q. You testified before, Mr. Lopez, that there was a policy, it was your intention to prosecute any violators, to fine them because they were violating that.

A. Our intention at that time was to see what was happening to the profit margin when they started the study. After that we should decide.

Q. Therefore, it was clear in your mind that there was no rule or order or regulation of DACO which prohibited price margins in exess of 8.6?

A. There was no regulation.

Q. So, therefore, this policy in your mind, it was not binding upon the wholesalers in that if they did follow it they were violating the law and subject to penalties and fines?

A. We thought that the margin in the—by former Secretary Ramos was a reasonable margin to be considered by the Department and to see if the consumers were adequately protected.

Q. But your conclusion that it was a reasonable margin is based on that it was the margin that your predecessor had and [132] not on studies, independent studies made by you to make sure it was a reasonable margin?

A. Yes, sir. We followed former Secretary Ramos's policy on that matter.

Q. One last question. You have indicated that you relied on certain documentation from the files to determine what Mr. Ramos's policy was. I take it that you never discussed this matter with Mr. Ramos?

A. Yes, I never discussed it with Mr. Ramos.

Q. You never discussed it with Mr. Ramos?

A. No, sir.

Q. So you were relying on what appears in those records and those files to determine what his policy was?

A. And with the assistance of the economist that worked with the Department when Mr. Ramos was the Secretary.

Q. So you also relied on the persons that were in the Department before?

A. That's right. The government had some continuity. Maybe the head of the Department changed but the people are usually the same and they are working, I know very well the area that they handled.

MR. GONZALEZ: I have no further questions, Your Honor. Thank you very much.

THE COURT: Esso, Mr. Sanchez.

CROSS EXAMINATION

* * * *

[BY MR. LOPEZ FELICIANO]

[134] A. Well, I had the files at the Department and I had fair knowledge of how the gasoline industry was developing. Not as an expert because I was not an expert, but with the benefit of the people which worked with the gasoline from the Department.

[BY MR. SANCHEZ—ESSO]

Q. By that date, September, 1985, how many gasoline wholesalers were there in Puerto Rico?

A. I cannot remember the exact figure, but I think it was nine or ten or something like that. I remember very well the retailers. It was around 1400 retailers around that time.

Q. I didn't hear you.

A. The retailers, there were about 1400 retailers. I think there was ten to 11 wholesalers, but I am not sure of the figure. I should see the record.

Q. Do you remember that there were ten or 11? Did that number—

A. I should see the record to be responsible, to give you a responsible answer to that question.

Q. But, there were more than those that you notified on the list that you—

A. That list was provided to me by the economic division and that's the information I had at that time.

Q. Were those the only wholesalers in Puerto Rico at that time?

A. That was the information I received from the economic [135] division of the department.

• • • •

[142] MR. COLEMAN: Your Honor, objection to the question. It says Article 3 joined to the federal standards—

THE COURT: In that sense, Mr. Coleman, I will take into consideration the text of the document in its full context.

BY MR. SANCHEZ:

Q. You stated that you were Secretary of the Department until March, 1986?

[BY MR. LOPEZ FELICIANO]

A. Yes, I was sworn as Superintendent of Police the 3rd of March of this year.

Q. In January of this year your Department held a public hearing with regard to the gasoline industry and their prices?

A. Yes, I ordered public hearings.

Q. Do you know what the result of those public hearings were?

A. When I left the Department I remember at that time I didn't receive the reports, final reports.

Q. Showing the witness Plaintiff's Exhibit—Esso Exhibit No. 3, which is a communique of the Department of Consumer Affairs dated February 5, 1983.

A. Yes, this corresponds to the petition of the retailers to fix a price on wholesaler, retailer levels.

Q. What happened? Those were the hearings—

A. There was no need to regulate.

[143] Q. There was no need to regulate prices?

A. No, sir.

THE COURT: Let me take a look at that.

(Whereupon the document was handed to the Court for its perusal.)

BY MR. SANCHEZ:

Q. During your tenure as Secretary of the Department of Consumer Affairs did you issue any order pertaining to Regulation No. 45 and fixing price margins at 8.6?

A. No.

Q. No, sir?

A. No, sir.

MR. SANCHEZ: I have no further questions, Your Honor.

THE COURT: Thank you very much.

Cross by Shell, Mobil?

MR. CESPEDES: Yes, Your Honor.

Your Honor, we have a proposed stipulation that might save some time with regard to this matter. We would like to approach the bench and ask for a bench conference. It will take only two minutes and possibly save us a couple of hours.

(Whereupon the bench conference is granted.)

[BY MR. CESPEDES]

Q. Did you at the Department of DACO determine a policy relying upon newspaper clippings?

[BY MR. LOPEZ FELICIANO]

A. No, sir.

Q. Do you as the Police Superintendent rely on newspaper clippings to determine policy?

A. No, sir.

Q. There is a reference on page 4 of your report. Page 4, sir.

A. Which exhibit, Counselor?

Q. The report which is Exhibit 31, right next to your—right there.

A. What page?

Q. 4. The implementation of the developing of price regulations. I'm sorry, it goes to the fifth page. The paragraph starting with "vigilance".

What instructions were given in connection with—if you will, keeping an eye on the observance of the 17.7 and the 8.6 margins?

A. The economist.

Q. During your term?

A. The economist division used to require information, accounting information, financial information through wholesalers to analyze their cost and cost of possible profit margins. As I told you before here, it was late in November and December, 1985, that I ordered a specific investigation to determine the development of the profit margins of wholesalers and retailers.

Q. My question to you, sir, is whether you during your tenure, whether you gave any specific instructions on the vigilance or keeping an eye on these margins. Did you?

A. No. The division operates on the current basis and that's something standard in the Department of Consumer Affairs.

Q. You had no reason during your tenure to give that instruction?

A. Until late November, 1985.

Q. What instructions did you give?

A. That we have to check if it was correct, the allegations of retailers and some other people in the community that wholesalers were having a profit margin over the 8.6 mentioned in the policy of the Department of Consumer Affairs.

Q. What were you to do if there were wholesalers or retailers not following what you have termed the policy of the Department?

A. Until I gave the order, I wanted to know if that allegation was true. But the study was not finished when I left the Department.

Q. Had it been true, what would you have done?

A. Well, at that moment, hypothetically, we should study what to do.

Q. Suppose that there were such infractions of the so-called [153] policy. What would you have done?

[BY MR. LOPEZ-FELICIANO]

A. I am not right now the Secretary of the Consumer Affairs. That question should be answered by the acting Secretary.

[BY MR. CESPEDES—SHELL AND MOBIL]

Q. My question to you, sir, is during your tenure since you were part of the committee, since you made a report to the committee and since you were in charge and you had this concern and you ordered the study, what would you have done if there had been a violation of the so-called policy?

A. I didn't read the report so I cannot answer the hypothetical question, because I didn't receive reports stating that that allegation was true.

Q. As a lawyer and in your tenure as Director or Secretary of DACO, do you feel that there was a rule, an order, regulation in place that the violation of which would have caused the Department to take action?

A. If I thought there was a policy by the former Secretary that in my opinion was reasonable to surveil development of the price and to protect the consumer, I answered here before that there was no specific order or regulation fixing such profit margins. That was the answer before.

Q. Do you agree with me that in the absence of a rule, order or regulation, no infraction or violation could be found?

MR. COLEMAN: Objection, Your Honor. That calls for a legal conclusion.

THE COURT: Sustained.

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[159] MR. COLEMAN: That's all.

THE COURT: Thank you very much for coming and helping. Thank you very much.

(The witness was excused at this time.)

THE COURT: Let's recall Mr. La Santa at this time.

MR. ROBINSON: If I could check something, Your Honor. My records show that the last exhibit introduced in evidence in Mr. La Santa's testimony was Exhibit No. 2.

I would like to clarify that that did get into the record for a limited purpose.

THE COURT: Yes, that is correct. Exhibit 2 was admitted into evidence.

(Whereupon, witness La Santa was recalled to the witness stand.)

DIRECT EXAMINATION
(continued)

BY MR. ROBINSON:

Q. Now, Mr. La Santa, I am trying to reconstruct the testimony that was heard before your testimony was interrupted, and I believe you had testified that the material shown on Exhibit No. 1 and Exhibit No. 2 were shown to the Secretary of DACO prior to his issuance of the April 23rd order, is that correct?

[BY MR. LA SANTA]

A. That is correct.

• • • •

[BY MR. LA SANTA]

[161] A. I showed him some woking papers wherein the picture was being reconstructed. By the week from February 7 through 21, from what I recall of the documents that I showed the Secretary those documents reflected—

[ATTORNEY FOR TENOCO]

MR. TOTTI: Objection, Your Honor. The documents are not before the Court and the witness is attempting to testify with regards to the contents of something that has not been submitted and that he says he showed the Secretary.

He may be entitled to testify that he showed documents, but not with regard to their contents.

THE COURT: Are you thinking in terms of a document that is not marked, by any chance?

MR. ROBINSON: Well, at the moment I have not heard his testimony, because I cannot understand Spanish, but if I am correct in understanding what he is testifying to, I believe he is testifying to work papers that he showed the Secretary that are not marked in evidence, Your Honor.

THE COURT: That's exactly what he said, yes.

MR. ROBINSON: Your question to me is whether they are already marked and the answer is no, they are not marked.

THE COURT: So, let's proceed on the basis of the documents.

BY MR. ROBINSON:

Q. Mr. La Santa, let me direct your attention to Exhibit No. 3, Defendant's Exhibit No. 3 for identification. Can you [162] identify that document?

A. Yes.

Q. Was it prepared by you or under your supervision or direction?

A. I myself prepared it.

Q. And when did you prepare it?

A. This summary on the situation, I prepared it during the second week of my—more or less about then.

MR. ROMERO: I think that the document has a date. As a mater of fact, it is May the 9th.

THE WITNESS: Yes, May 9, 1986.

BY MR. ROBINSON:

Q. Does that date reflect the date that you completed this document, Mr. La Santa?

A. Yes.

Q. Now, Mr. La Santa, where did you get the information that went into this summary?

A. I obtained it from the information submitted by the wholesalers from a request that was made of them on March 31 of the current year.

Q. Did you rely on any other information other than information provided to you by the wholesalers to make up this exhibit?

A. For this piece of evidence, no. I did not use any other information. Only information that was requested and informa- [163] tion that the companies supplied.

• • • •

[170] MR. GONZALEZ: Objection.

THE COURT: Let's note that CARECO objects on the safe grounds. Esso objects on the same grounds. Shell/Mobil objects. Texaco and Petrolera.

[ATTORNEY FOR CARIBE]

MR. LOPEZ: I further object to the admission of that evidence on, that particular evidence on the grounds of pertinency and relevancy as far as Caribe is concerned.

MR. ROMERO: I object also.

THE COURT: I could not admit this document under Rule 1006 as a–summary because it definitely does not comply with the requirements of that rule as that rule has been drafted by the committee and eventually ap-

proved by the Congress and interpreted by the federal case law.

If you want to go to Rule 105 as one more document which the Secretary had at the time he issued the May 20th order, I have no problem with that. And even over the objection of Caribe I will mark it as an exhibit in a limited sense.

MR. ROBINSON: Your Honor, that was my motion in the alternative.

THE COURT: Very well, it will be marked as Defendant's Exhibit 3 under Rule 105 with the limited purpose of showing that this working paper prepared by Mr. La Santa was considered by the Secretary when he issued the May 20th order.

[171] MR. CARLOS LOPEZ: Your Honor, I didn't hear the last part of the ruling stating Caribe.

THE COURT: Your objection as you presented it to the Court is overruled.

MR. CARLOS LOPEZ: Thank you, Your Honor.

(Defendant's Exhibit No. 3 is marked and admitted.)

BY MR. ROBINSON:

Q. Mr. La Santa, I would like to direct your attention now to Defendant's Exhibit 6 for identification.

Was this document prepared by you or under your supervision or direction?

[BY MR. LA SANTA]

A. Yes, it was prepared by me.

Q. Now, can you identify this document for us, Mr. La Santa?

A. Yes. It is a summary of the wholesalers' gross profits during the period of January through March, 1986.

MR. ROBINSON: Your Honor, to save time and to hopefully prevent a barrage of objections, I might point out that Exhibit 6 simply takes information from Exhibit

3 and transfers it in a different form to Exhibit 6, with the exception of the assumed 8.6 margin, and the columns thereafter were additional calculations that are made from that data.

THE COURT: Under those circumstances my ruling as to the exhibit would be the same as I had given you for Exhibit 3.

MR. ROBINSON: Right, Your Honor.

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[BY MR. ROMERO]

[189] Q. Mr. La Santa, you have heard the testimony of the Secretary of the Department of Consumer Affairs yesterday about the margins of benefits?

[BY MR. LA SANTA]

A. Yes.

Q. And you heard him testify that margins of benefits for the 8.6 which he used as a guideline is a—is taken after the cost of acquisition of gasoline?

A. Acquisition cost.

Q. And the acquisition cost does not include the cost of transportation?

A. No.

Q. Did you hear Mr. Lopez Feliciano here today?

A. No, the Court put me under the Rules.

Q. Mr. La Santa, are you familiar with Article 45—Regulation 45 as amended?

A. Yes.

Q. Mr. La Santa, is that the authority that you used during those years from 1981 on to determine or to say that there was an 8.6?

A. Yes, it was the authority in law that I had.

Q. Yes. And this is the authority upon which the April 23rd order was issued?

A. Yes.

Q. And the order of April 29?

A. Yes.

[190] Q. And the order of May 20th?

A. Yes.

Q. Showing the witness now Regulation 45, Article 4—

THE COURT: That's Plaintiff's Exhibit 7, am I right?

THE CLERK: 7, yes, sir.

BY MR. ROMERO:

Q. Could you please read Article 4 to yourself just to refresh your memory?

(Whereupon the witness reads the above-mentioned document.)

BY MR. ROMERO:

Q. Is there anyplace in the whole Regulation No. 45 where it talks about an 8.6 margin for wholesalers?

A. Of the 8.6 specifically, no.

Q. So, your guidelines for determining prices or margins is Article 4, is that correct?

A. Yes.

Q. Why did you not use as a criteria for determining margins of profit and reasonable net profits as required by Article 4, Subsection 8?

MR. ROBINSON: Objection, Your Honor.

THE COURT: Grounds?

MR. ROBINSON: The question said, "As required by Article 4, Section 8." That is a legal conclusion. The docu- [191] ment speaks for itself.

• • • •

[193] BY MR. ROMERO:

Q. Mr. La Santa, in the information which you gave Mr. Lopez Feliciano—Mr. Ortiz Alvarez for the determination of the April 23rd order, we have the exhibits

which we have identified as the—where are the exhibits for defendants? 1, 2, 3 and 6? Correct myself. The ones that you gave him you said were 1 and 2.

The other documents, Exhibit Nos. 3 and 6, you gave to him after the April 23rd and April 29th order?

[BY MR. LA SANTA]

A. Could you repeat the question?

Q. The documents, Exhibit 3 and Exhibit 6, you gave to Mr. Ortiz Alvarez after the order of April 23rd and April 29th?

A. 3 and 6 after the order?

Q. Yes. And before the May 20th order. But after the orders of April 23rd and April 29?

A. After the orders of what dates?

Q. April 23rd and April 29th?

A. Yes.

[194] Q. So, the olny specific information you submitted to Mr. Ortiz Alvarez for the orders of April 23 and 29 was on Texaco, Shell, Esso and Mobil?

A. Yes.

Q. So, I am going now to show you a copy of the order of April 23, and please read it to yourself. The third and fourth paragraphs. Let me know when you are finished.

A. Third and fourth paragraph?

Q. Yes.

(Whereupon the witness complies.)

BY MR. ROMERO:

Q. How many wholesale distributors are there in Puerto Rico?

A. Wholesale distributors as classified by us as large, we have six. There are small ones, three.

Q. Was this order prepared by you and submitted to Mr. Ortiz Alvarez for his signature or did he prepare it himself?

A. As far as I can remember he prepared the order himself with the assistance of the office staff.

Q. And your help?

A. Yes.

Q. At the moment of the excise tax entering into effect, the larger portion of the wholesale distributors had not transferred to their clients the totality of the deduction in the price of the gasoline occasioned by the reduction in the price of petroleum caused by the reduction in price of petroleum?

• • • •

PETITIONER'S

BRIEF

Supreme Court, U.S.
FILED
NOV 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,
Petitioners,

v.

ISLA PETROLEUM CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the Temporary Emergency Court of Appeals

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BRIEF FOR THE PETITIONERS

LYNN R. COLEMAN *
DOUGLAS G. ROBINSON
MATTHEW W.S. ESTES
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

MARCOS A. RAMIREZ IRIZARRY
DENNIS A. SIMONPIETRI MONEFELDT
RAMIREZ & RAMIREZ
117 Eleanor Roosevelt Avenue
Hato Rey, Puerto Rico 00918
(809) 758-5660

HECTOR RIVERA CRUZ
Secretary of Justice
Commonwealth of Puerto Rico

RAFAEL ORTIZ CARRION
Solicitor General
Commonwealth of Puerto Rico

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Did Congress intend that the Emergency Petroleum Allocation Act of 1973, as amended (the "EPAA"), would permanently preempt state regulation of petroleum prices even after the expiration of the EPAA itself in 1981?

2. Did *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board*, 474 U.S. 409 (1986), fundamentally alter traditional preemption principles by reversing the presumption that state law is not preempted absent a clear and manifest congressional intent to do so?

LIST OF PARTIES

Petitioners

1. Department of Consumer Affairs of the Commonwealth of Puerto Rico.
2. Pedro Ortiz Alvarez, Secretary of the Department of Consumer Affairs.

Respondents

1. The Shell Company (Puerto Rico) Ltd.
2. Mobil Oil Caribe, Inc.
3. Phillips Puerto Rico Core, Inc.
4. Caribbean Gulf Refining Corp.
5. Texaco Puerto Rico, Inc.
6. Esso Standard Oil Co. (P.R.)
7. Isla Petroleum Corp.
8. Gasolinas de Puerto Rico Corp.
9. Tenoco Oil Co., Inc.*
10. Cia. Petrolera, Inc.*

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* Tenoco Oil Co., Inc. and Cia. Petrolera, Inc. were parties to the District Court proceeding but did not participate in the TECA proceeding and have not entered an appearance in this proceeding.

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O'Donnell and Glassman, *Energy Emergencies: Constitutional Constraints on State Efforts to Control Oil Supplies and Prices*, 5 Energy L.J. 77 (1984)	46

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1406

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,
Petitioners,

v.

ISLA PETROLEUM CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the Temporary Emergency Court of Appeals

BRIEF FOR THE PETITIONERS

Petitioners, the Department of Consumer Affairs of the Commonwealth of Puerto Rico and its Secretary, Pedro Ortiz Alvarez (collectively, "DACO"), submit this brief urging reversal of a decision of the Temporary Emergency Court of Appeals ("TECA"). That decision upheld an order issued by the United States District Court for the District of Puerto Rico enjoining DACO from regulating local gasoline prices and profit margins.

OPINIONS BELOW

The Memorandum Opinion and Order of the District Court for the District of Puerto Rico is reported as *Isla Petroleum Corp. v. Department of Consumer Affairs*, 640 F. Supp. 474 (D.P.R. 1986), and is reprinted in the Supplemental Appendix to DACO's Petition for a Writ of Certiorari. TECA's opinion, together with the dissenting opinion, issued on December 29, 1986, is reported as *Isla Petroleum Corp. v. Puerto Rico De-*

partment of Consumer Affairs, 811 F.2d 1511 (TECA 1986), and is attached to DACO's Petition as Appendix A. TECA's order denying DACO's request for a rehearing, issued on January 30, 1987, is attached to DACO's Petition as Appendix B.

JURISDICTION OF THIS COURT

TECA's judgment was entered on December 29, 1986. On January 12, 1987, DACO timely petitioned that court for rehearing and suggested that the case be reheard *en banc*. On January 30, 1987, DACO's petition and suggestion were denied. DACO's Petition for a Writ of Certiorari was filed on March 2, 1987, pursuant to 28 U.S.C. § 1254(1) (1982) and Section 5(a)(1) of the EPAA, 15 U.S.C. § 754(a)(1) (1982). Section 5(a)(1) of the EPAA incorporates by reference the review provisions of Section 211(g) of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. § 1904 (note) (1982). Section 211(g) of the ESA provides that within thirty days after entry of any judgment or order by TECA, a petition for a writ of certiorari may be filed in the Supreme Court, and thereupon the judgment or order shall be subject to review in the same manner as provided in 28 U.S.C. § 1254. On October 5, 1987, this Court granted DACO's petition and issued the writ of certiorari.

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The Supremacy Clause of the United States Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

Section 18 of the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. § 760g (1982), which was added thereto by Section 461 of the Energy Policy and Conservation Act of 1975 ("EPCA"), Pub. L. No. 94-163, § 461, 89 Stat. 941, 955 (1975), and which provides for the expiration of federal controls under the EPAA, is attached to DACO's Petition for a Writ of Certiorari as Appendix C. Section 3 of Puerto Rico's Law No. 228 of 1942, 23 L.P.R.A. § 734 (1964), which grants the authority to regulate the price of staple commodities, is attached to DACO's Petition as Appendix D. Section 6(a) of Puerto Rico's Law No. 5 of 1973, 3 L.P.R.A. § 341e(a) (1982), which grants DACO the authority to regulate the prices and profit margins of goods, products and services sold in Puerto Rico, is attached to DACO's Petition as Appendix E. DACO Regulation No. 45, as amended, which provides for local regulation of prices and profit margins of gasoline and other petroleum products upon the expiration of federal controls under the EPAA, is attached to DACO's Petition as Appendix F. The regulatory orders DACO issued in the spring of 1986 that DACO has been enjoined from enforcing are set forth at DACO's Petition as Appendix G at 42a; J.A. 10; and J.A. 21.

STATEMENT OF THE CASE

This case involves the Commonwealth of Puerto Rico's attempt to exercise a traditional state police power on behalf of its citizens by regulating local wholesale gasoline prices and profit margins. While the enjoined regulations related only to wholesale prices of gasoline on the island of Puerto Rico, the impact of this case extends much further. At issue here is whether Congress has forbidden all states and other local jurisdictions from regulating local petroleum prices. On a higher level, also at issue is whether congressional intent to preempt state regulation should be presumed when Congress provides for the complete termination of federal regulation in a given area of economic activity.

History of Petroleum Regulation in Puerto Rico

Puerto Rico has for many years regulated prices of essential commodities consumed within the island. Section 3 of Law No. 228 of 1942, 23 L.P.R.A. § 734 (1964), authorized DACO's predecessor agency to regulate the prices of staple commodities such as rice, milk and petroleum products. Pursuant to this authority, Puerto Rico commenced the regulation of the prices of gasoline and other petroleum products in 1953,[1] when Korean War price regulation at the federal level terminated.

Petroleum controls were imposed because of Puerto Rico's isolated location, its lack of indigenous petroleum resources and the high degree of concentration of its petroleum industry at the refining and wholesale distribution levels.[2] In 1978, the Puerto Rican legislature found that "[t]here is no real competition at the refining and retail and wholesale distribution levels in the gasoline industry, nor are there conditions that propitiate the development of such competition." Section 1 of Act No. 73 of 1978, 23 L.P.R.A. § 1131 (legislative determinations) (Supp. 1983). Since that time, the industry has become even more concentrated, with Chevron's acquisition of Gulf, Sup. Ap. at SA-50,[3] the agreement of Shell and Mobil to operate their Puerto Rican affiliates jointly, Sup. Ap. at SA-9, the withdrawal of ARCO from the Puerto Rican market and the closing of the largest refinery on the island, owned by Commonwealth Oil Refining Company. As a result, the number of refiners in Puerto Rico has been reduced to two and the number of

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[1] Price Regulation No. 4, promulgated on September 24, 1953, which instituted petroleum price regulation in Puerto Rico, is provided in DACO's Petition as Appendix I.

[2] There are four levels of operations in the petroleum industry: production, refining, wholesale distribution and retail distribution. Puerto Rico has no oil production, but the other levels of operation occur in Puerto Rico.

[3] The Supplemental Appendix to DACO's Petition for a Writ of Certiorari is cited to herein as "Sup. Ap. at ——."

wholesalers reduced to eight.[4] Both of the refiners and four of the wholesalers are subsidiaries of multinational oil companies. These four wholesalers have obtained the large majority of the Puerto Rican wholesale market. *See* Transcript, Vol. III at 213-14.

Puerto Rico regulated wholesale petroleum prices from 1953 until 1973, when Congress instituted emergency federal price controls pursuant to the Emergency Petroleum Allocation Act ("EPAA"). While expressly preempted from regulating local gasoline prices during the effectiveness of the EPAA, Puerto Rico acted to ensure that it would be able to reestablish a regulatory scheme when the federal controls terminated. In August of 1975, DACO promulgated Regulation No. 45, which established a scheme for the regulation of gasoline, kerosene and diesel fuel prices in Puerto Rico. Sup. Ap. at SA-12. After the effectiveness of the EPAA was extended by the Energy Policy and Conservation Act ("EPCA"), Regulation No. 45 was amended to provide that it would become effective as soon as the extended period of federal controls terminated. *Id.*

Article 3 of Amended Regulation 45 (hereinafter referred to as "Regulation 45") provides that no refiner, wholesaler or retailer may raise its prices without giving DACO 15 days' prior notice of the increase.[5] Pet. Ap. at 37a.[6] Article 4 stated that DACO could regulate gasoline prices based on certain criteria. Pet. Ap. at 37a-38a. Although the extent to which DACO enforced Regulation 45 after the lifting of federal controls was

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[4] This number includes two small wholesalers, Coqui and Tenoco, that entered the market in the 1980s and gained only a small share of the market. Tenoco's share at its highest point prior to trial was 5%. Sup. Ap. at SA-38. Coqui's share, although unstated at trial, was about half of Tenoco's. Sup. Ap. at SA-40.

[5] Gasoline retailers were later released from this 15 days' price increase notice requirement.

[6] The Appendix to DACO's Petition for a Writ of Certiorari is cited to herein as "Pet. Ap. at ——."

disputed at trial, there was no real dispute, and the district court found, that "[b]y its express terms, [Regulation 45] became effective upon the lifting of federal price controls on January 28, 1981." Sup. Ap. at SA-12.

Puerto Rican Regulations at Issue Here

After reaching their peak around 1980, world oil prices started a gradual decline that lasted until late 1985, when the price of oil plummeted. This sharp decline continued during the first three months of 1986. DACO collected information that wholesalers were not passing on the full amount of these price decreases to their retail station customers. Sup. Ap. at SA-19. This information showed that the major wholesalers had increased their profit margins (*i.e.*, the difference between their acquisition costs and their sales prices) by as much as 200 to 300 percent over the prior year. J.A. at 22.

The Puerto Rican legislature on March 18, 1986, passed an excise tax on gasoline. Law No. 5 of 1986 (Mar. 18, 1986); Sup. Ap. at SA-21. This tax varied inversely with the world market price of crude oil. It was designed to operate in conjunction with DACO's price controls to prevent wholesalers from retaining additional profits by not passing on price reductions to their retailer-customers.[7] Shortly after the passage of the ex-

[7] The legislature, in the statement of legislative purpose accompanying the tax bill, stated that:

> the State has the obligation of adopting measures for guaranteeing that the benefit obtained from the drastic drops in world petroleum prices is also transferred to the entire Puerto Rican public. *This will be achieved in part through the imposition of the excise provided in this law,* whose purpose is to channel resources for social welfare works and services, *and on the other hand, using governmental mechanisms for price control, if the businesses do not channel them on their own initiative.*

Sup. Ap. at SA-22 (quoting legislative purposes of Law No. 5 of 1986) (emphasis in original).

cise tax, DACO issued the three orders that are at issue here.

The first order was issued on March 26, 1986 (the "March 26 Order").[8] It reaffirmed the requirement of Article 3 of Regulation 45 that no price increase could take effect without 15 days' prior notice to DACO. Pet. Ap. at 42a-45a.

DACO's next order was issued on April 23, 1986. ("April 23 Order"). DACO stated therein that its information revealed that wholesalers had enjoyed profit margins in the first quarter of 1986 that were far greater than DACO considered reasonable. J.A. at 11. DACO therefore imposed a temporary price freeze on all wholesalers, prohibiting them from charging retailers a price greater than that charged on March 31, 1986.[9] J.A. at 11. The April 23 Order also provided for a May 10 hearing, later changed to May 12, at which the wholesalers would be permitted to submit evidence as to why Puerto Rican wholesalers claimed a need for higher gross profit margins than those prevailing in the continental United States, as well as to the steps that DACO should take to prevent excessive margins. J.A. at 11-12.

Shortly after April 23, however, world petroleum prices began to rise again. This rise, combined with the newly effective excise tax and the April 23 price freeze, began to squeeze wholesalers' profit margins. DACO's May 12 hearing was nevertheless boycotted by all wholesalers except Tenoco and Coqui, the two smallest wholesalers, leaving the Department with a lack of company-specific information with which to evaluate the major

[8] DACO issued identical orders to each of the refiners and wholesalers in Puerto Rico. These orders are referred to collectively as the "March 26 Order." A representative example of the March 26 Order is attached to DACO's Petition as Appendix G at 42a.

[9] DACO issued an additional order on April 23 to the two Puerto Rican refiners. J.A. at 7. This order clarified that the price freeze was not applicable to them.

wholesalers' claimed need for higher gross margins.[10] (Rather than participate in the DACO regulatory proceedings, the wholesalers brought injunction actions in the federal district court.)

DACO's third order was issued on May 20, 1986 (the "May 20 Order"). J.A. at 21. In that order, DACO, aware that wholesalers' costs were rising, terminated the price freeze and implemented a new temporary regulatory measure. The general scheme of the May 20 Order was to apply to all wholesalers an 8.6 cents-per-gallon gross profit margin limitation.[11] J.A. at 24-26. Because DACO found that certain wholesalers, including all of the major companies, had exceeded this standard by substantial amounts in the first quarter of 1986, J.A. at 22, 24-25, these particular companies at first were restricted to a 3.6 cents-per-gallon profit margin. This lower margin restriction was to be lifted for each company after its average margin for the period subsequent to January 1, 1986 fell to 8.6 cents. J.A. at 25. These companies whose average gross margin had not exceeded 8.6 cents since the beginning of the year were permitted to continue to obtain a profit margin up to that level. J.A. at 24.

The May 20 Order also provided for additional hearings at which wholesalers would again be given the opportunity to demonstrate factually their contention that the 8.6 cent margin limitation was not adequate and

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[10] What troubled DACO was that while it appeared that average wholesale gross margins in the continental United States were in the range of five cents a gallon, those in Puerto Rico in the first quarter were four or five times as high. J.A. at 49.

[11] At trial DACO contended that this same 8.6 cent-per-gallon margin limitation had been adopted by DACO in 1981 when federal controls were removed and applied thereafter by DACO in regulating wholesalers. The district court found that the 8.6 cent limit had been "adopted informally as a reference point" by DACO since 1981, Sup. Ap. at SA-14, and had been used to "overlook" the wholesalers' prices. Sup. Ap. at SA-15. While DACO has argued that its regulation was more pervasive, resolution of this dispute is not necessary here.

otherwise to comment on the future need for margin limitations. J.A. at 28-29. The order additionally established expedited procedures under which wholesalers could petition DACO for immediate relief from the margin limitations. J.A. at 27-28.

District Court Proceedings

As noted above, while DACO was considering the actions that led to the May 20 Order, the wholesalers and refiners began to file the complaints initiating the instant proceeding. J.A. at 1-2. The various cases were consolidated on May 14, and a May 21 preliminary injunction hearing date was set. J.A. at 2. On May 16, the district court *sua sponte* ordered that the preliminary injunction hearing would also be consolidated with a full trial on the merits, J.A. at 2, and on May 20 the court deemed the complaints amended to encompass a challenge not only to the March 26 and April 23 Orders, but also to the much different May 20 Order. Sup. Ap. at SA-29 n.11. Despite this sudden and unexpected escalation of the stakes in the proceeding, the court held the parties to the May 21 trial date.

The trial lasted three days. On June 4, the district court found for the wholesalers and enjoined DACO from enforcing its orders or from issuing any new orders regulating the price of gasoline. Sup. Ap. at SA-86-87. The court's holding was based on its conclusion that DACO's orders were "preempted by the federal Congressional delegated purpose to let the market forces be sovereign in this field." Sup. Ap. at SA-86. The court divined this congressional purpose from the EPAA, as amended by EPCA. *Id.* In addition, the court concluded that the orders violated the wholesalers' federal substantive due process rights and amounted to a taking without just compensation in violation of the Fifth or Fourteenth Amendment of the U.S. Constitution. Sup. Ap. at SA-66-67.

TECA Proceedings

Appeals from decisions of the District Court for the District of Puerto Rico normally lie in the United States Court of Appeals for the First Circuit. Because TECA has exclusive jurisdiction over all issues arising under the EPAA, however, DACO pursued a dual appeal of the district court's holding. The preemption holding, which was based on the EPAA, was appealed to TECA, and the substantive due process and takings holdings were appealed to the First Circuit.[12]

On December 30, 1986, TECA upheld the district court's preemption holding, over the strong dissent of Judge Christensen. The panel majority acknowledged that this Court had addressed the identical issue in 1982 in *Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982), holding that state regulation is not preempted after the expiration of the EPAA. Pet. Ap. at 11a. The majority concluded, however, that "[a]lthough *Tully* appears to answer the question we now face, the context of its appeal to the Supreme Court and the Supreme Court's recent decision in *Transcontinental* [13] convince us that *Tully* is not an appropriate guide for our decision." *Id.*

TECA read *Transcontinental* as reversing the traditional presumption against the preemption of state laws and regulations. Instead, TECA interpreted *Transcontinental* as requiring a presumption in favor of continued preemption in cases where Congress terminates prior

[12] The question of the appropriate standard of review of DACO's orders in a collateral attack in the federal district court, as well as the issue of whether the federal court should have abstained until state law remedies had been exhausted, were appealed to the First Circuit and are not at issue here. *See Tenoco Oil Co. v. Department of Consumer Affairs*, No. 86-1590 (1st Cir. appeal stayed Jan. 23, 1987). DACO followed the procedures mandated by TECA for the appeal of district court rulings that raise both EPAA and non-EPAA issues. *See, e.g., Spinetti v. Atlantic Richfield Co.*, 522 F.2d 1401, 1403 (TECA 1975) (issues not arising under the EPAA should be appealed to the appropriate circuit court of appeals).

[13] *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board*, 474 U.S. 409 (1986).

federal regulation. Pet. Ap. at 12a. Because TECA found no affirmative evidence in the legislative history of the EPAA and EPCA that Congress intended a return of state police power authority in this area. TECA held that DACO's regulations were preempted. Pet. Ap. at 17a-18a.

On January 30, 1987, TECA denied DACO's request for rehearing and suggestion that the case be reheard *en banc*. On March 2, 1987, DACO filed its petition for a writ of certiorari.[14] This petition was supported by twelve states, as well as by the National Association of State Energy Officials and the Puerto Rico Gasoline Retailers Association, Inc.

On April 27, 1987, this Court requested the views of the United States. On August 21, 1987, the Solicitor General filed a brief supporting DACO's petition and joining in DACO's request that TECA's decision be reversed.

On October 5, 1987, this Court granted DACO's petition and issued a writ of certiorari to TECA.

SUMMARY OF THE ARGUMENT

A. In analyzing preemption cases, this Court has started "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *International Paper Co. v. Ouellette*, 107 S. Ct. 805, 811 n.11 (1987). The clearest evidence of such intent is an express provision preempting state law.[15] *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). State law may also be preempted where Congress has occupied the field, *Pacific Gas and Electric Co. v. State*

[14] At the same time, the First Circuit stayed its proceedings pending this Court's final resolution of the preemption issue.

[15] Section 6(b) of the EPAA, 15 U.S.C. § 755(b), contained an express preemption clause. Since that clause clearly ceased to operate when the statute expired on September 30, 1981, neither of the courts below relied on this section as authority for its holding.

Energy Resources Conservation and Development Commission, 461 U.S. 190, 204 (1983), or "to the extent that [state law] actually conflicts with federal law." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985). The conflict may be a physical one where compliance with both state and federal law is impossible, *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or where the state action is found to be an obstacle to the full accomplishment of congressional purpose. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

There being no question of Congress occupying the field here (quite the contrary, Congress was withdrawing from the field), and no physical conflict possible in the complete absence of federal regulation, TECA appears to have rested its conclusion upon an "obstacle" analysis. TECA thus found that DACO's regulations frustrated a congressional purpose, even though there is *no* currently effective federal statute from which such intent may be gleaned. In so holding, TECA misinterpreted Congress' stated intent in the applicable statutes and legislative history, misapplied this Court's traditional preemption analysis and even disregarded this Court's on-point holding in *Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982).

B. The sole evidence of congressional intent relied on by TECA to find Puerto Rico's regulations preempted consists of general conference report statements referring only to Congress' desire to eliminate gradually federal controls. From these statements, TECA concluded that it is "inconceivable" that Congress could have intended to permit the return of state regulation subsequent to the phased termination of federal controls. Pet. Ap. at 13a.

1. TECA made no analysis of the statutory language. The EPAA, as amended by EPCA, expressly provided for the preemption of state law, but only to the extent that state law conflicted with federal regulations and orders issued under the EPAA. 15 U.S.C. § 755(b). The language of the statute itself therefore plainly indicates that Congress intended that state regulation be preempted only while the authority to regulate at the federal level was in effect. Far from following the evident statutory intent, TECA would convert the "conflict" preemption concept of the EPAA before September 1981 into a negative "occupation of the field" after the EPAA's expiration.

2. Instead of basing its decision on the statutory language, TECA relied on general statements in the EPCA legislative history expressive of congressional intent to "return to an unregulated market" to support its holding that state regulation is preempted even after the expiration of the EPAA. The full context of the statements in the conference report on which TECA relied reveals that Congress was concerned only with the mechanism and effects of removing federal controls. Nothing in the conference report gives any indication that Congress intended to preempt state regulation after the federal standby authority expired. Indeed, the quotation relied upon by TECA suggests an intent to revert to the market that existed in 1973 prior to the enactment of the EPAA, when the states obviously possessed the power to regulate the petroleum industry at the local level.

3. What is "inconceivable," Pet. Ap. at 13a, is not that Congress intended a return to the pre-1973 market, but that it would harbor an intent to foreclose the states from exercising their traditional police powers over local petroleum markets without saying so or amending the EPAA provision that dealt with the subject. Congress' silence does not provide the "clear and manifest" expression of congressional intent that is necessary to overcome the presumption against preemption. *California Federal Savings and Loan Association v. Guerra*, 107 S. Ct. 683, 693 (1987).

4. Congress' actions subsequent to the expiration of the EPAA strongly confirm that it did not view state law as preempted after federal regulatory authority lapsed. At

the time of the EPAA's expiration, some in Congress were clearly concerned about the post-EPAA absence of preemption. In 1982, Congress passed the Standby Petroleum Allocation Act ("SPAA"), which expressly reestablished both standby emergency regulatory authority and federal preemption of state price or allocation regulations. The legislative history of the SPAA reveals no instance in which any member of Congress indicated a belief that the SPAA preemption provision was unnecessary because state law was already preempted by the expired EPAA. This post-EPAA effort at permanent preemption failed, however, when President Reagan vetoed the SPAA.[16]

Congress then enacted the Energy Emergency Preparedness Act ("EEPA"), in recognition of the President's position that no additional standby authority was necessary. The EEPA merely provided only for a report to Congress on the extent to which such authority already exists in other laws. Instead of expressly preempting state law, the EEPA contained an express disclaimer against preemption. Subsequent efforts in Congress to reach agreement with the Administration on legislation that would preempt state action have been unsuccessful.

C. Shortly after the expiration of the EPAA in 1981, this Court specifically addressed in *Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982), the issue of the post-expiration preemptive effect of the EPAA. In that case, the Court summarily vacated a preemption-based permanent injunction, entered prior to the expiration of the EPAA, on the ground that federal interest terminated with the expiration of the EPAA.

D. TECA, recognizing that *Tully* was on point, held that this Court's later decision in *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board*, 474 U.S. 409 (1986), justified TECA's deviation from *Tully*.

[16] The U.S. Department of Energy supported a veto of the SPAA, in part because the preemption provision was in conflict with the President's approach to federalism. 128 Cong. Rec. S1367 (daily ed. Mar. 2, 1982).

TECA read *Transcontinental* as announcing a new standard of general application that calls for the continued preemption of state law even after complete termination of federal regulation unless there is affirmative congressional intent to *permit* such state law. Pet. Ap. at 12a. TECA's conclusion was clearly erroneous.

This Court in *Transcontinental* addressed a far different issue than the one presented here. *Transcontinental* involved the determination of congressional intent in enacting the Natural Gas Policy Act. That Act deliberately freed one narrow category of natural gas production from price regulation as part of its general revision of a regulatory scheme that maintained comprehensive federal controls over other aspects of the industry. This case, on the other hand, involves the complete federal withdrawal from the temporary regulation of an economic activity which traditionally has been an appropriate subject for state policy making, and there has been no congressional expression of intent that federal-state relations in this area are to remain permanently altered. Since the time of *Transcontinental*, this Court has addressed preemption issues several times without ever indicating that the time-honored presumption against preemption has been eroded.

E. The circumstances in Puerto Rico demonstrate why state petroleum regulation should not be preempted absent a clear and manifest congressional intent. The Puerto Rican market did not respond to the decreasing world oil prices in the same fashion as the more competitive markets in the continental United States. Puerto Rico was thus confronted with special circumstances that the government decided should be addressed through means deemed to be effective to benefit the public. It is a fundamental aspect of state sovereignty which, for these purposes, Puerto Rico fully shares under its unique status,[17] that the local government be able to decide these

[17] *See Examining Board of Engineers, Architects and Surveyors v. Otero*, 426 U.S. 572, 594 (1976); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 671-73 (1974).

matters for itself absent a clear manifestation of federal interest expressed through federal law.

ARGUMENT

I. Congressional Intent to Preempt the Exercise of a State's Traditional Police Powers Must Be Clear and Manifest.

Application of the Supremacy Clause "must be guided by respect for the separate spheres of governmental authority preserved in our federalist system." *Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211, 2221 (1987) (quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981)). Thus, this Court has always "start[ed] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *International Paper Co. v. Ouellette*, 107 S. Ct. 805, 811 n.11 (1987) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

Congress can evidence its intent to preempt state law in a number of ways. The clearest evidence of this intent is when Congress preempts through explicit statutory language. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Congress may also demonstrate its intent to preempt state regulation by providing an ongoing, comprehensive federal regulatory scheme that on its face evidences a congressional intent to fully occupy the field of regulation. *See, e.g., Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 204 (1983); *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 153 (1982). Even if Congress has not foreclosed state regulation of a specific area either by expressed intent or by full occupation of the field, state law is superseded "to the extent that it actually conflicts with federal law." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985). Such a conflict exists when "compliance with both federal and state regulation is a physical impossibility," *Florida Lime and Avocado*

Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or when state law "stands as an obstacle to the accomplishment . . . of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

However, in the final analysis, "[t]he critical question . . . is *always* whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Commission v. FCC*, 106 S. Ct. 1890, 1899 (1986) (emphasis added). Further, this Court has repeatedly cautioned that "courts should not lightly infer preemption." *International Paper Co. v. Ouellette*, 107 S. Ct. at 811. *See also New York State Department of Social Services v. Dublino*, 413 U.S. 405, 413 (1973). To the contrary, this Court "starts with the basic assumption that Congress did *not* intend to displace state law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (emphasis added).

Although the Commonwealth of Puerto Rico is not a State of the Union, it is clear that its laws enjoy the same standing in our federal system as those of any state. This Court, which had the occasion to examine the Commonwealth's status in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), found that "Puerto Rico is to be deemed 'sovereign over matters not ruled by the Constitution.'" 416 U.S. at 673. *See also Examining Board of Engineers, Architects and Surveyors v. Otero*, 426 U.S. 572, 594 (1976) (Congress accorded Puerto Rico "the degree of autonomy and independence normally associated with States of the Union."). As a consequence, there can be no doubt that Puerto Rico may exercise traditional state police powers on behalf of its citizens. Although Puerto Rican law, like that of any state, will be preempted where that is the clear and manifest intent of Congress, Puerto Rico is entitled to the same basic threshold assumption as are all states—that Congress has not intended to displace its laws.[18]

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[18] Indeed, in different contexts this Court has indicated that substantial deference to Puerto Rican judgments concerning Puerto Rican internal affairs is appropriate in light of the Commonwealth's

It is just as clear that gasoline price regulation is well within the traditional police powers of the states under the Constitution. *See, e.g., Nebbia v. New York*, 291 U.S. 502, 537 (1934) ("[T]here can be no doubt that upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged for the products or commodities it sells."); *Munn v. Illinois*, 94 U.S. 113, 133 (1877) (States have the power to establish maximum prices for enterprises "clothed with a public interest."); *cf. Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128-29 (1978) (states have the power to regulate the retail marketing of gasoline). Thus Puerto Rico plainly has authority to regulate local gasoline prices when Congress has expressed no "clear and manifest purpose" to supersede such state regulation by federal legislation. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. at 230; *cf. Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. at 2222 (Preemption should not be lightly inferred in an area that falls within the traditional police powers of the State.).

In this case, there has been no explicit preemption of state petroleum price regulation since the expiration of the EPAA on September 30, 1981. Nor since that date has there been any petroleum price regulation at the federal level whatsoever. As a consequence, preemption in this case cannot be based upon application of long-

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unique status in the federal system. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982). *See Calero-Toledo*, 416 U.S. at 674 (The Court has "a due regard for the status of [the] Commonwealth under its compact with the Congress of the United States," quoting *Wackenhut Corp. v. Aponte*, 266 F. Supp. 401, 405 (D.P.R. 1966), *aff'd*, 386 U.S. 268 (1967)); *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42-43 (1970) ("Federal courts, reversing Puerto Rican courts, were inclined to construe Puerto Rican laws in the Anglo-Saxon tradition which often left little room for the overtones of Spanish culture. Out of that experience grew a pronouncement by this Court that a Puerto Rican court should not be overruled on its construction of local law unless it could be said to be 'inescapably wrong.'"); *Cordova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank*, 649 F.2d 36, 39-42 (1st Cir. 1981).

accepted principles, as this Court specifically ruled in *Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982).[19]

TECA recognized that its preemption holding in this case would not withstand scrutiny under the *Tully* decision or this Court's traditional preemption analysis. Nevertheless, TECA found support for its decision in the legislative history of the 1975 EPCA amendments to the EPAA, and in this Court's recent *Transcontinental* decision. Pet. Ap. at 17a. In so holding, TECA misinterpreted the relevant statutes and legislative history and misread this Court's precedents.

II. There Is No Express or Implied Congressional Intent to Preempt State Petroleum Regulation After September 30, 1981.

The sole evidence of congressional intent relied on by TECA to find Puerto Rico's regulations preempted consists of general statements in the EPCA conference report referring only to Congress' desire to gradually eliminate *federal* controls. From these statements, TECA concluded that it is "inconceivable" that Congress could have intended to permit state regulation to occur once federal authority expired. Pet. Ap. at 13a. As discussed below, nothing in the statute or its legislative history provides any indication, much less the strong evidence required, that Congress intended to preempt permanently a traditional state police power once federal intervention terminated. To the contrary, when the history of federal petroleum regulation is viewed in its full context, it seems clear that Congress fully intended a return to the situation that existed prior to the enactment of the EPAA.

A. State Regulation of Petroleum Prices Was Not Preempted Prior to 1973.

Prior to 1973, when the EPAA petroleum price and allocation regulations became effective, state regulation

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[19] The full implications of the *Tully* case are discussed at Section III below.

over the local petroleum industry was not preempted. In fact, Puerto Rico had regulated local petroleum product prices on a continuous basis since 1953. Pet. Ap. at 3a.[20] TECA implicitly acknowledged the authority of the states to regulate in this area prior to the advent of federal intervention, finding that preemption arose from the emergency federal regulatory laws enacted in the 1970s. Pet. Ap. at 14a.

B. The EPAA as Originally Enacted Clearly Did Not Prescribe Post-Expiration Preemption.

The federal government first engaged in comprehensive petroleum price and allocation regulation in 1973 in response to the supply shortages created by the Arab oil embargo.[21] To mitigate the effects of the resulting energy crisis, Congress enacted the Emergency Petroleum Allocation Act ("EPAA"). Pub. L. No. 93-159, 87 Stat. 628 (1973) (codified as amended at 15 U.S.C. §§ 751-760g (1982)).

Although Section 4 of the EPAA gave the President extensive authority to regulate the pricing and allocation of all petroleum products, that authority was only temporary. Section 4(g)(1) originally provided that the authority to promulgate, issue, amend or enforce any such regulation expired on February 28, 1975. 87 Stat. 632. The Act's declaration of purpose emphasized that it was intended to be only a temporary departure from the status quo:

> The purpose of this [Act] is to grant to the President of the United States and direct him to exercise

[20] *See* pp. 4-5, *supra*.

[21] The Economic Stabilization Act, 12 U.S.C. § 1904 (note) ("ESA"), enacted in 1970, gave the President authority to impose wage and price controls generally throughout the economy. President Nixon exercised that authority between 1970 and 1973 to regulate the prices of a wide range of commodities, including petroleum. Price control authority under the ESA expired on April 30, 1974, but the EPAA extended the President's pricing authority over crude oil, residual fuel oil and refined petroleum products and, in addition, gave him the authority to adopt allocation regulations.

> specific *temporary* authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this [Act] shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy.

15 U.S.C. § 751(b) (emphasis added).

The legislative history of the EPAA further highlighted the intended short term nature of the federal intrusion. As the Conference Report noted:

> By way of initial emphasis it should be noted that the bill which the Conference Committee reports today is not designed to and should not be interpreted as increasing supplies of critically short petroleum products. *The shortage problem is the result of policies which have been in effect over a number of years, and it awaits a more far reaching and long ranged solution. Instead, this bill focuses on the short term objectives* of seeing to it that during times of shortage our priority needs are met and that whatever limited supplies we have are equitably distributed throughout the nation to meet regional needs and preserve competition in the marketplace.

H.R. Conf. Rep. No. 628, 93d Cong., 1st Sess. 13-14, *reprinted in* 1973 U.S. Code Cong. & Admin. News 2688, 2690-91 (emphasis added) (hereinafter referred to as the "EPAA Conference Report").[22]

[22] The House Committee Report, reporting the bill that was for the most part adopted by the conferees, also emphasized the intended temporary nature of the Act. The passage quoted above from the EPAA Conference Report was itself a quotation from the House Committee Report. H.R. Rep. No. 531, 93d Cong., 1st Sess. at 6, 1973 U.S. Code Cong. & Admin. News 2582, 2583 (hereinafter referred to as the "EPAA House Report"). In addition, the House Committee stated that it "wishes to emphasize that this is a temporary authority which will expire approximately 18 months after enactment . . . ." EPAA House Report at 19, 1973 U.S. Code Cong. & Admin. News at 2596.

There can be little question that the preemption of state regulation of petroleum prices and allocation was intended to be of similarly short term duration. Congress' intent in this regard does not have to be inferred, for the EPAA had a specific preemption provision. Section 6(b) expressly provided for the preemption of any state regulation *in conflict with* any federal regulation or order issued by the President pursuant to Section 4. Because the President's authority to impose regulations or orders under Section 4 was set to expire on February 28, 1975, federal preemption of state law had to expire on that date as well, since there would no longer be any Section 4 regulation or order that could conflict with state law.

Again, TECA appears to have agreed that nothing in the EPAA as originally enacted would suggest congressional intent to preempt state regulation subsequent to its expiration. Instead, TECA, in fathoming such intent, relied entirely on the legislative history of amendments to the EPAA enacted in 1975 that, among other things, extended its expiration date to September 30, 1981. Pet. Ap. at 12a-14a. As detailed in the next section, the legislative history of these amendments provides no basis for a finding of preemption.

C. The EPCA Amendments Did Not Amend the Limited Preemption Provision of the EPAA, and in the Legislative History of Those Amendments There Is No Indication That Congress Intended Preemption of State Regulation Subsequent to the Termination of Federal Controls.

As the expiration date of the EPAA approached, the executive and legislative branches debated the direction of federal regulation of petroleum prices and allocation. An inability to enact a compromise led to three short term extensions of the Act past its original February 28, 1975 expiration date,[23] the last one extending controls to

[23] Emergency Petroleum Allocation Act—Extension, Pub. L. No. 93-511, 88 Stat. 1608 (1974); Emergency Petroleum Allocation Act of 1975, Pub. L. No. 94-99, 89 Stat. 481 (1975); Emergency Petroleum Allocation Act—Extension, Pub. L. No. 94-133, 89 Stat. 694 (1975).

December 12, 1975. During this time, three basic positions were advanced.

President Ford favored allowing price controls to terminate when the EPAA expired, without providing for any additional federal regulation. H.R. Rep. No. 340, 94th Cong., 1st Sess. 7, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1762, 1769 (hereinafter referred to as the "EPCA House Report"). This proposal was greatly criticized, and was later withdrawn by the President, who proposed instead a phase-out of controls over a 25-month period. *Id.*

The Senate took a somewhat different approach, passing a bill that would have extended the effectiveness of the EPAA for only a few months—to June 30, 1976. This bill also would have instituted a number of additional standby authorities that could be implemented in the event of a new energy emergency. S. Rep. No. 26, 94th Cong., 1st Sess. 22-23 (1975). Those standby authorities would have expired on June 30, 1977. *Id.* at 48.

In contrast to the plans proposed by the President and the Senate, both of which would have promptly phased out controls, the House transformed the EPAA "from temporary to permanent law." House EPCA Report at 58, *reprinted in* 1975 U.S. Code Cong. & Admin. News at 1820. *See id.* at 14, *reprinted in* 1975 U.S. Code Cong. & Admin. News at 1776. The House bill did provide, however, for the eventual conversion of EPAA regulation over many categories of petroleum to a standby status, to be implemented thereafter only in the event of an energy emergency. *Id.* at 58-60, *reprinted in* 1975 U.S. Code Cong. & Admin. News at 1820-22.

The regulatory scheme finally adopted in the Energy Policy and Conservation Act ("EPCA"), Pub. L. No. 94-163, 89 Stat. 941 (1975), was a compromise among these disparate positions. First, Congress chose to use

the statutory scheme of the EPAA as the framework for continuing regulation and subsequent conversion to standby authority, rather than creating a new statutory scheme. Thus Congress enacted amendments to the EPAA in Title IV of EPCA.[24] 89 Stat. 941 (1975). In Title IV, the EPAA's mandatory requirement that the President regulate petroleum prices was, with some modifications in that authority not relevant here, extended for another 40 months.[25] After 40 months, the President's authority to regulate prices and allocation became discretionary for a 28-month period. This discretionary standby authority terminated on September 30, 1981.[26] Thus, the new legislation provided for the eventual phase-out of federal controls, as proposed by the President and the Senate, but, in a concession to the views of the House, the schedule for phased decontrol was extended.

Significantly, Congress did not state anywhere in EPCA that it intended to preempt state law or have petroleum prices governed solely by market forces subse-

[24] The other titles of EPCA consisted of other approaches to resolving the nation's energy problems and did not involve petroleum price or allocation regulation. Title I was intended to increase domestic energy supplies and created a Strategic Petroleum Reserve. Title II provided for participation in the International Energy Agency and provided for emergency conservation and rationing programs. Title III was designed to improve energy efficiency and conservation, and Title V included provisions of general applicability. 89 Stat. 871-969 (1975) (codified as amended at 42 U.S.C. §§ 6201-6422 (1982 and Supp. 1985)).

[25] The President could, under specified circumstances, propose the deregulation of certain categories of petroleum products during the 40-month "mandatory" period, but such proposals were subject to a one-house congressional veto. EPCA §§ 401, 455, 551; 15 U.S.C. §§ 757(e), 760a(c) (1982); 42 U.S.C. § 6421 (1982).

[26] Section 461 of EPCA, 15 U.S.C. § 760g (1982), added a new Section 18 to the EPAA that provided for the conversion from mandatory to discretionary controls by eliminating the restrictions on the President's decontrol authority after 40 months. Section 18 also provided for the September 30, 1981, termination date for federal regulatory authority.

quent to the expiration of the standby authority in 1981. In fact, while Title IV made several detailed amendments to the EPAA, Section 6(b), the already extant express preemption section, was not amended at all. As a consequence, the express language of the EPAA, even after the passage of the EPCA, still provided that state law was preempted only to the extent that it *conflicted* with federal regulations. Thus, even after the EPCA amendments, the language of the statute itself indicated Congress' intent not to preempt state regulation once federal regulations terminated.

TECA made no analysis of the statutory language, except to note that Puerto Rico's Regulation 45 was clearly preempted while federal controls were in effect. Pet. Ap. at 8a. Nevertheless, it inferred an intention to preempt after the cessation of all federal regulatory authority based only on general references in the conference report to the scheme for the gradual removal of Federal regulations.

In particular, TECA relied on two similar statements in the report. In one, the conferees stated that, "[t]o the extent mandatory controls are no longer needed or desirable, a gradual return to an unregulated market is preferable to sudden decontrol." S. Conf. Rep. No. 516, 94th Cong., 1st Sess. 203, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1956, 2045 (hereinafter referred to as the "EPCA Conference Report"), *quoted at* Pet. Ap. at 13a. In the other, the committee said that "[e]xtension of the EPAA and its conversion to standby authority offers . . . the potential for a smooth transition of petroleum markets from a closely regulated state to a large[ly] unregulated status subject to standby pricing and allocation authority." *Id.* at 204, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1956, 2045, *quoted at* Pet. Ap. at 13a.

TECA's focus in each case was on the word "unregulated." The use of that word in these statements, neither of which makes any reference to state regulation or the

preemption thereof, left the TECA majority with no doubt whatsoever as to Congress' intent on post-EPAA preemption:

> It is *inconceivable* that Congress would implement such an extensive and carefully orchestrated termination of federal intervention with the intention that the states step in to regulate the same subject matter as soon as all federal intervention ceased.

Pet. Ap. at 13a (emphasis added).

A review of the relevant portion of the Conference Report in its full context, however, reveals that it is TECA's conclusion which is "inconceivable." That Congress was concerned in this discussion only with the mechanism and effects of removing *federal* controls is demonstrated by a lengthier quotation from that section of the conference report relied on by TECA:

> The United States still faces a critical energy problem. However, the dimensions of that problem are far different from those which existed in 1973 and were addressed by the EPAA. There is no longer a general shortage of either crude oil or refined petroleum products, with the possible exception of propanes. In many ways, the supply side of the market has returned to near the pre-embargo conditions which prevailed in 1972.
>
> In view of these changed conditions, a comprehensive regulatory structure of the scope outlined above may no longer be necessary. On the other hand, *to allow such a comprehensive structure to expire, overnight, may itself create severe dislocations. To the extent that mandatory controls are no longer needed or desirable, a gradual return to an unregulated market is preferable to sudden decontrol.*
>
> In addition, while some products or some markets may no longer need mandatory price and allocation controls, conditions are not identical throughout the entire industry. Moreover, certain policies adopted in Title IV of this legislation would require continuation of certain controls. Section 401 establishes a

> pricing policy applicable to domestic crude oil which promises to maintain domestic crude oil prices below the OPEC cartel-established world market prices. *This policy requires a continuation of certain programs established pursuant to the authorities of the EPAA.*
>
> • • • •
>
> The conferees believe that the flexibility of the existing law and its demonstrated adequacy during the 1973-74 Arab embargo make it a prime candidate for conversion to a standby authority. The conferees believe that such conversion would be preferable to enactment of a separate authority.
>
> Extension of the EPAA and its conversion to a standby authority offers, in addition, *the potential for a smooth transition* of petroleum markets from a closely regulated state to a large [sic] unregulated status subject to standby pricing and allocation authority.

EPCA Conference Report at 203-04, *reprinted in* 1975 U.S. Code Cong. & Admin. News at 2045 (emphasis added).

Nothing in this discussion gives any indication that Congress intended to extend the preemptive effect of the EPAA beyond the period of the standby authority. Clearly the focus is on the removal of federal controls, not on the return of state authority to regulate in this area. While the conferees referred to "a gradual return to an unregulated market," the use of the word "return" is suggestive of reversion to the market as it existed prior to enactment of the EPAA, when the states indisputably possessed the power to regulate the industry at the local level. Moreover, the sentence from which these words were lifted was not addressing the precise status of the market once the "return" was accomplished; rather, it was only making the point that a "gradual return" was preferable to "sudden decontrol."

The second time the words "unregulated market" were used is in the last quoted paragraph above. There, the phrase "large[ly] unregulated status" upon which TECA

relied is modified by the phrase "subject to standby pricing and allocation authority," which obviously refers to the 28-month discretionary control period when such control authority remained available on a "standby basis." There is no standby authority after September 30, 1981. *See* EPCA Conference Report at 208, *reprinted in* 1975 U.S. Code Cong. & Admin. News at 2050 ("[a]s standby authority, the Act expires on September 30, 1981"). Hence, on its face, the language relied upon by TECA does not appear to refer to the post-EPAA period. In any event, the phrase used was "*large*[*ly*] unregulated market." (emphasis added). This is in fact an accurate description of petroleum markets when the states have *not* been preempted.[27]

Thus, even the very words of the conference report relied on by TECA do not support the conclusion that TECA drew from them and, if anything, suggest an intent by Congress to return to market conditions as they existed prior to enactment of the EPAA. The only thing certain about the quoted discussion is that the conferees were addressing the manner in which *federal* controls should be removed.[28] Such discussion cannot be the foundation for preemption, for as this Court has noted, "it is necessary to look beyond general expressions of 'national policy' to specific federal statutes with which the state law is claimed to conflict." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981).

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[27] Most states did not regulate petroleum prices before the EPAA and have not attempted to institute such regulations since that time. In practical effect the market has been "largely unregulated" except during the period of federal controls.

[28] Indeed, a search of the entire history of the EPCA amendments reveals no discussion whatsoever of the subject of state law preemption after the expiration of the EPAA. Permanent preemption is itself an issue that would have been extremely controversial. Yet TECA concluded that Congress resolved this issue in favor of permanent preemption without so much as a word on the subject in its hearings, reports or debates!

When, as required by *Commonwealth Edison*, the statutory language is brought back into focus, TECA's error in finding the necessary intent to preempt in this conference report language becomes even more glaring. Section 6(b) plainly preempted state regulation only in the event of a conflict with federal regulations and orders that no longer exists. Thus, what is "inconceivable" is not that Congress intended a return to the pre-1973 market but that it would have intended permanently to foreclose the states from regulating that market without amending the only provision of the EPAA that dealt with the subject and without even mentioning the subject directly in the legislative history.[29]

D. Subsequent Legislative Actions Refute TECA's Conclusion That the EPAA Continues to Preempt State Regulation.

Congress has, however, addressed the subject since the expiration of the EPAA. Legislative actions subsequent to the expiration of the EPAA confirm that neither the Congress nor the Executive has viewed the EPAA as permanently preempting local regulation of gasoline prices.[30]

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[29] Neither TECA, the district court nor the Respondents have cited to any legislative history that mentions the subject of state law preemption, and the Petitioners' own search has revealed none.

[30] Although this Court has cautioned against giving conclusive weight to post-enactment legislative history in interpreting a statute, it has noted that subsequent actions by Congress may be instructive in discerning legislative intent. *See Bowsher v. Merck & Co.*, 460 U.S. 824, 837 n.12 (1983) (examining subsequent attempts by the Senate to enact legislation in interpreting an earlier statute). This is particularly true when the subsequent legislative history confirms the plain meaning of a statute. *E.g., Andrus v. Shell Oil Co.*, 446 U.S. 657, 666-671 (1980).

1. *Even Before the Expiration of the EPAA, Congress Revealed Its Belief That States Would Be Free to Regulate After Federal Controls Terminated.*

In 1981, during the last days of the effectiveness of the EPAA, Congress once again took up the task of formulating a new federal energy regulatory policy to succeed the soon-to-expire EPAA. To that end, both the Senate and the House conducted numerous hearings from February through September 1981,[31] when the federal regulations were in standby status but the EPAA had not yet expired.

While most of the hearings concerned the proper role of the federal government in regulating petroleum markets, the issue of state law preemption was addressed by the Senate Committee on Energy and Natural Resources. At hearings held on July 28 and 30, 1981, two reports addressing the subject were introduced. The first, written by the American Petroleum Institute, detailed several proposed bills pending in state legislatures that would take effect upon expiration of the EPAA. *Government Responses to Oil Supply Disruptions: Hearings on S. 409, S. 445, S. 1354, S. 1476 and S. 1503 Before the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. 125-132 (1981). The second report, authored by the Congressional Research Service of the Library of Congress, concluded that state petroleum regulation would not be preempted subsequent to the expiration of the EPAA. *Id.* at 133-224. The conclusion of this latter

[31] *See Effects of Oil Decontrol: Hearings Before the Subcomm. on Fossil and Synthetic Fuels of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. (1981); *Oil Emergency Preparedness: Hearings on H.R. 4313 Before the Subcomm. on Fossil and Synthetic Fuels of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. (1981); *Standby Oil Controls: Hearings Before the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. (1981); *Government Responses to Oil Supply Disruptions: Hearings on S. 409, S. 445, S. 1354, S. 1476 and S. 1503 Before the Senate Comm. on Energy and Natural Resources*, 97th Cong., 1st Sess. (1981).

report, quoted at the hearing by Senator Ford, reads as follows:

> It seems likely that unless the Congress moves to continue EPAA in its present standby status, or enacts other laws preventing state regulation by preemption, many states are likely to provide new statutory authority to regulate some aspects of pricing and allocation which were subject to regulation under EPAA.
>
> In addition to moving to fill the void of Federal regulation, the expiration of EPAA also marks a point where state regulation may be expanded for purposes of providing tax revenue, carrying on production conservation, and other forms of regulation which may have formerly conflicted with EPAA.
>
> While EPAA's expiration is presently automatic, it would seem that the impact of total termination of Federal regulation should be carefully assessed at the national level because of the enormous economic significance of petroleum and because of what has now become our obvious dependence upon unreliable foreign sources for petroleum.
>
> The potential impact of numerous differing state laws regarding allocation and distribution of petroleum, even though they may be constitutional, is difficult to assess in a practical sense.

Id. at 133. Senator Durenberger, sponsor of one of the bills under consideration, then assured Senator Ford, who was concerned about the possibility of differing state law, that his bill contained an express preemption provision that "take[s] care of the problem." *Id.* at 225.

Senator Bumpers also expressed concern that "the Governors and the legislators of different states [would] start passing their own bills" in the time period between the expiration of the EPAA and the effectiveness of whatever new statute might be enacted at the federal level. *Id.* at 228. Senator Bumpers suggested that the solution might be to extend the effectiveness of the EPAA until the new statute was enacted. *Id.* at 229.

The issue was raised anew on the next day of the hearings, when W. Kenneth Davis, Deputy Secretary of Energy, testified as to the administration's position on standby authority. Senators McClure and Ford both expressed concern that, in the absence of a new federal statute, states would begin regulating the price and allocation of petroleum. *Id.* at 278-81. Mr. Davis conceded that this might occur, but insisted that this possibility did not require action at the federal level. *Id.* at 279.

These expressions by individual congressmen and administration officials cannot, of course, be accepted as conclusive on the issue. They do, however, illustrate a uniformity of view at that time among members of the jurisdictional Senate committee and a senior official of the responsible executive department as to whether the EPAA would continue to preempt beyond its expiration date. Thus, several expressed concern about the absence of preemption; no one expressed the view that the EPAA would continue to preempt after its expiration.

2. Post-EPAA Congressional Action to Preempt State Regulation Was Vetoed by the President.

From the hearings described above emerged the Standby Petroleum Allocation Act ("SPAA"), S. 1503, 97th Cong., 2d Sess., 128 Cong. Rec. H409 (daily ed. Feb. 22, 1982); *see* 128 Cong. Rec. S1351-71 (daily ed. Mar. 2, 1982); 128 Cong. Rec. H615-28 (daily ed. Mar. 3, 1982). While declining to reinstitute the price and allocation regulations that had been a feature of the EPAA, Congress granted the President extensive authority to regulate the price and allocation of petroleum in a "severe petroleum supply shortage." SPAA Section 2(a), 128 Cong. Rec. H410 (daily ed. Feb. 22, 1982). Of particular relevance here, Section 2(a) also explicitly preempted any state law regulating the price or allocation of any petroleum product regardless of whether there was a declared emergency or whether the state regulation actually conflicted with any federal regulation.[32] *Id.*

[32] Senator Johnson noted that "big oil" supported the SPAA because "if you do not have a national policy, you are going to have 50 separate State policies." 128 Cong. Rec. S1360 (daily ed. Mar. 2, 1982). Many oil companies contacted the White House to express support for the bill. *See* 128 Cong. Rec. S2723-24 (daily ed. Mar. 24, 1982).

The SPAA was vetoed, however, by President Reagan on March 22, 1982.[33] S. Doc. No. 25, 97th Cong., 2d Sess. (1982). An effort in the Senate to override the veto was not successful and the SPAA thus never became law. 128 Cong. Rec. S2745-46 (daily ed. Mar. 24, 1982).[34]

Congress' failure to enact an explicit post-EPAA preemption provision is likewise not dispositive of congressional intent at the time it enacted the EPCA amendments. However, the fact that Congress in 1982 ex-

[33] Although President Reagan did not mention the preemption provision in his veto message, Senator Bradley placed into the record during the floor debate over the SPAA a memorandum from the Department of Energy to the President recommending that the SPAA be vetoed, in part because of that provision. That memorandum contained the following discussion of the SPAA's preemption provision:

> ***The bill is in direct conflict with the President's Federalism program.*** S. 1503 [the SPAA] requires extensive preemption of State and local energy laws, and also requires Federal approval of any State set-aside program. States currently have any number of different laws, in many different fields, from zoning to alcohol consumption, from interest rates to utility regulation. ***There is no reason to single out this area for Federal preemption,*** and many reasons not to; particularly given the results of Federal activity in energy regulation in the recent past.

128 Cong. Rec. S1367 (daily ed. Mar. 2, 1982) (emphasis added).

[34] Congress' concern that the states were free to enact local petroleum regulations became one of the rallying points in the effort to override President Reagan's veto of the SPAA. Senator Henry Jackson (who had been the Chairman of the Senate Committee that reported the EPAA and EPCA) urged that the SPAA be enacted "[i]f for no other reason . . . [than] just *to establish* a strong Federal preemption provision that will bring some order to petroleum markets both before and during petroleum supply disruptions." 128 Cong. Rec. S2729 (daily ed. Mar. 24, 1982) (emphasis added).

pressed the need for explicit new legislation if state law was to be preempted, without a single voice being raised to assert that preemption was already achieved by existing law, certainly refutes TECA's assertion that a congressional intent not to preempt was "inconceivable." Congress' inclusion of an express preemption provision in the SPAA indicates a strong congressional belief that such a provision was necessary to preempt state regulation after the expiration of the EPAA, casting further doubt on whether Congress has ever had the requisite "clear and manifest" congressional intent to preempt state law.

3. *Following the SPAA Veto, Congress Enacted the Energy Emergency Preparedness Act, Which Expressly Disclaims Preemption of State Regulation.*

In the wake of the veto of the SPAA, Congress moved to enact a bill addressing emergency energy policy that was acceptable to the President. The result was the Energy Emergency Preparedness Act ("EEPA"). Pub. L. No. 97-229, 96 Stat. 248 (codified in scattered sections of 42 U.S.C.).

The EEPA was a significant retreat from the SPAA. First, instead of giving the President extensive power to regulate petroleum prices and allocation in the event of a supply shortage, the EEPA merely required the President to submit to Congress a memorandum of law describing the existing authorities available to the President to deal with an energy emergency. 42 U.S.C. § 6282(a). The President was also required, subsequent to submitting the memorandum, to prepare a plan describing how the existing authorities would be implemented in the event of an energy emergency. 42 U.S.C. § 6282(b).

The issue of preemption was also addressed in the EEPA. Apparently concerned by indications from the Administration that it had opposed the SPAA in part because of its preemption provision,[35] Congress retreated from its

[35] *See* n.33, *supra*.

previous stand in favor of the preemption of state petroleum regulation. Instead, after reviewing Department of Energy efforts to coordinate federal and state energy policy,[36] and questioning Department of Energy officials on the potential effect of conflicting state regulation, S. Rep. No. 393, 97th Cong., 2d Sess. 12, 22, *reprinted in* 1982 U.S. Code Cong. & Admin. News 600, 608, 618, Congress simply required that the President's memorandum on existing authorities include a discussion of "energy emergency response management in coordination with state and local governments." 42 U.S.C. § 6282(a)(3)(vi).[37] In order to make its intent clear on this point, Congress included the following disclaimer in the EEPA: "No State law or State program in effect on August 3, 1982, or which may become effective thereafter, shall be construed to be superceded by any provision of this part." 42 U.S.C. § 6282(c)(2).

In an effort to reconcile Congress' most recent expression on the subject of state law preemption with the inference TECA drew from the EPCA amendments, TECA gave the EEPA a bizarre meaning. TECA concluded that the preemption disclaimer of the EEPA created a special exception for state emergency actions from the general condition of full preemption. TECA reasoned that "only in shortages creating energy emergencies do states have the power to regulate petroleum product allocation and prices to ensure health, safety and welfare." Pet. Ap. at 18a.

[36] The Senate Committee Report described this as a review of "[n]ew initiatives to coordinate Federal energy policies with the 50 states *in the absence of statutory preemption*." S. Rep. No. 393, 97th Cong., 2d Sess. 12, *reprinted in* 1982 U.S. Code Cong. & Admin. News 600, 608 (emphasis added).

[37] One of the conclusions of that memorandum was that state petroleum price regulations are not preempted. Office of Legal Counsel, Department of Justice, *Memorandum of Law, Legal Authorities Available to the President to Respond to a Severe Energy Supply Interruption or Other Substantial Reduction in Available Petroleum Products* 70-74 (Nov. 15, 1982).

This reasoning turns logic and public policy on its head for two reasons. First, Congress did not intend to make major substantive law changes by enacting the EEPA. Its purpose was merely to provoke a response from the President on the nature of the authorities he claimed to possess and how he intended to use them in a petroleum supply emergency.

Second, under TECA's strained interpretation, state regulation is prohibited during non-emergency situations when the need for uniformity is at its lowest, but such regulation is *permitted* during emergencies, when the need for a unified national response is greatest. Such a result is not only illogical, but it runs exactly counter to the concerns expressed by Congress during its consideration of post-EPAA legislation. For example, the Senate Committee Report on the SPAA gives the following rationale for including an express preemption provision in the SPAA:

> [A] major petroleum supply disruption is a national problem that demands a coordinated national policy in response. If the Federal Government failed to respond, the States and local governments would soon feel compelled to address the shortage in their own areas. This would soon result in a hodgepodge of conflicting State and local laws that would disrupt commerce and possibly exacerbate the adverse effects of the shortage on the Nation as a whole.

S. Rep. No. 199, 97th Cong., 1st Sess. 12 (1981). Similarly, during consideration of the EEPA, the concern was expressed that "State and local laws . . . could seriously inhibit operation of market allocation and pricing, and . . . could interfere with federal energy emergency responses in the event of an energy shortage." S. Rep. No. 393, 97th Cong., 2d Sess. 22, *reprinted in 1982 U.S. Code Cong. & Admin. News* 600, 618. Given these and similar expressions of concern, it is inconceivable that Congress intended state law to be preempted *except* in times of energy emergencies. Yet that will be

precisely the law of the land if TECA's decision is allowed to stand.

4. *The Subsequent Congressional Attempt to Preempt State Law Was Unsuccessful.*

After passage of the EEPA, Senator McClure made one final attempt to provide for the preemption of state petroleum price regulation. In 1983, he introduced S. 1678, 129 Cong. Rec. S10,763 (daily ed. July 25, 1983), which contained several amendments to Title II of EPCA. Section 6 of the bill would have preempted all state petroleum pricing and allocation regulation except for those regulations specifically exempted from preemption by the President.

This provision was opposed by the Administration, however. In forwarding to the Senate Committee on Energy and Natural Resources the Administration's proposed amendments to S. 1678, Helmut A. Merklein, Assistant Secretary for International Affairs and Energy Emergencies, U.S. Department of Energy, stated that "[w]e think this reverses the presumption that ought to apply to State and local laws, and represents an unwarranted departure from principles of Federalism." *Energy Emergency Preparedness Act Amendments of 1983; and the International Energy Agency Program: Hearing Before the Senate Comm. on Energy and Natural Resources*, 98th Cong., 1st Sess. 612 (1983). S. 1678 was never reported out of committee, and Congress to date has not raised the subject again.

III. This Court Previously Held That State Petroleum Regulation Is Not Preempted After the Expiration of the EPAA.

Shortly after the EPAA expired, this Court, in *Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982), ruled on the very question presented in this case: whether the EPAA has preemptive effect subsequent to its expiration. In *Tully*, ten oil companies challenged a 1980 New York gross receipts tax on oil company revenues derived from

their activities within the state. The tax included an "anti-passthrough" provision that prevented the oil companies from passing the costs resulting from the tax to consumers. The oil companies contended that this provision was preempted by the EPAA. The district court agreed and issued an injunction permanently enjoining enforcement of the anti-passthrough provision. *Mobil Oil Corp. v. Tully*, 499 F. Supp. 888, 910 (N.D.N.Y. 1980).[38]

In 1981, shortly before the expiration date of the EPAA, TECA affirmed the district court's decision. *Mobil Oil Corp. v. Tully*, 653 F.2d 497 (TECA 1981). In affirming the district court, however, TECA stated that "[*w*]*hen the statute expires in September 1981, it will signal the end of federal concern in this area.* Until that time the state statute is in conflict with the federal statute and regulations." *Id.* at 502 (emphasis added). With this statement, TECA indicated that it believed that the EPAA would have no preemptive effect beyond its expiration date.

New York appealed TECA's decision to this Court. On October 13, 1981, two weeks *after* the expiration of EPAA, the Court asked the parties for their views on whether expiration of the statute mooted the case. *See* Letter from Alexander L. Stevas, Clerk, United States Supreme Court, to all Counsel of Record in *Tully v. Mobil Oil Corp.*, No. 81-96, October 13, 1981, attached to DACO's Petition as Appendix J. Several parties con-

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[38] Connecticut passed a similar tax and anti-passthrough provision in 1980 that was also the subject of litigation. *See Mobil Oil Corp. v. Dubno*, 492 F. Supp. 1004 (D. Conn. 1980). The *Dubno* court found that the Connecticut statute was also preempted by the EPAA. 492 F. Supp. at 1015. This decision was appealed to the Court of Appeals for the Second Circuit. The Second Circuit did not reach the merits because it concluded that TECA had exclusive jurisdiction to resolve the preemption issue. *See Mobil Oil Corp. v. Dubno*, 639 F.2d 919, 921-22 (2d Cir.), *cert. denied*, 452 U.S. 967 (1981). The district court's preemption holding was not appealed to TECA, however.

tended that the case was not entirely moot because there remained some pre-decontrol issues related to the anti-passthrough provision and the validity of the tax prior to the EPAA's expiration. But no party asserted that the EPAA had preemptive effect beyond its expiration date.

This Court, in a *per curiam* summary disposition of the appeal, vacated TECA's judgment and remanded the case for reconsideration of the collateral issues raised in the appeal in light of the expiration of the EPAA. *Tully*, 455 U.S. at 248-49. The Court based its decision on the ground that the permanent injunction entered by the district court was not valid beyond the EPAA's expiration date. As the Court explained:

> The expiration date for the federal statute has come and gone; *the only barrier to the enforcement of the antipassthrough provision no longer exists.* However, the injunction entered by the District Court and affirmed by TECA did not terminate on October 1, 1981, the date that TECA acknowledged to signal the end of federal concern in the area. Thus, in its present form the declaration of the invalidity of the antipassthrough provision and the accompanying injunction against enforcing it have no current validity and must be set aside.

Id. at 247 (footnote omitted) (emphasis added).

The Court further emphasized that the EPAA's preemptive force had terminated, stating that "[w]hatever bearing [the EPAA's saving clause, 15 U.S.C. § 760g] may have upon other aspects of the case, *it surely cannot mean that, despite the expiration of the pre-empting federal law, New York should be permanently enjoined from enforcing its antipassthrough provision.*" *Id.* at 247 n.2 (emphasis added). The *Tully* Court thus vacated TECA's judgment on the very ground at issue in this case, holding that the EPAA does not have preemptive effect on state regulation subsequent to the date of its expiration.

In its opinion below, TECA acknowledged that "*Tully* appears to answer the question we now face." Pet. Ap. at 11a. One of the reasons TECA disregarded the *Tully* decision was "the context of its appeal to the Supreme Court . . . ." *Id.* The "context" referred to, apparently, was the fact that the parties to that proceeding had addressed only the pre-expiration effect of the EPAA. In support of that conclusion TECA discussed Justice Stevens' dissent, in which he stated that he would affirm the pre-expiration portion of the case and simply not rule on the post-expiration issue. *See* 455 U.S. at 249-51.

TECA's reliance on Justice Stevens' reasoning is curious, for it proves the opposite of the point TECA was trying to make. His dissent makes it clear that the Court did consider whether simply to affirm TECA on the pre-expiration issue and leave the post-expiration issue to a later case. But the majority chose not to do so. No doubt it was influenced by the fact that it was not a difficult or, at that time, even a controversial issue. Since the Court had given the parties a full opportunity to make the post-decontrol preemption argument, their failure to do so should not be a ground of distinction. Rather, it is apparent, particularly in light of the statute itself and the oil industry's position at that time before Congress that the SPAA's preemption provision was required,[39] that no party felt it could make a credible argument that the expired statute continued to have preemptive effect.

Thus, even though the ruling in *Tully* came in the context of a summary disposition, there was a full opportunity for the parties to address the post-expiration preemption issue, and there can be no question that the issue was decided on the merits. Indeed, such decision was the basis for the Court's disposition of their appeal.

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[39] See note 32, *supra*.

IV. TECA Erroneously Relied on *Transcontinental* to Deviate from *Tully* and This Court's Traditional Preemption Analysis.

Although TECA recognized that "*Tully* appears to answer the question we now face," the court refused to adhere to that decision, explaining that "the context of its appeal to the Supreme Court and the Supreme Court's recent decision in *Transcontinental* convince us that *Tully* is not an appropriate guide for our decision." Pet. Ap. at 11a. TECA found *Transcontinental* to be the controlling precedent even though it involved a different federal statutory scheme and nowhere mentions *Tully*. Rather than requiring "evidence of a congressional intent to pre-empt . . . state law," *Wardair Canada, Inc. v. Florida Department of Revenue*, 106 S. Ct. 2369, 2372 (1986), TECA effectively read *Transcontinental* as reversing this burden of proof by focusing the inquiry on "whether by removing federal price controls Congress intended to allow the States to step in." Pet. Ap. at 12a. TECA implicitly held that the presumption should be *against* the return of state police power authority *unless* expressly authorized by Congress. *Id.* A review of *Transcontinental* demonstrates that, in coming to this conclusion, TECA misinterpreted the *Transcontinental* decision and misapplied it to the issue presented in this case.

The *Transcontinental* decision is best understood as an analysis of congressional intent in enacting a particular statute and not, as TECA concluded, a departure from the requirement that preemption must be based upon clear and manifest evidence of congressional intent to preempt. *Transcontinental* involved the question of whether a Mississippi regulation requiring a pipeline to take "deep gas" ratably from all producers in a gas field was preempted by federal law. In 1963, this Court had held that a virtually identical ratable-take order was preempted by the Natural Gas Act of 1938 ("NGA"), 15 U.S.C. §§ 717-717z (1982), on the ground that the order interfered with the NGA's "comprehensive scheme of federal regulation." *Northern Natural Gas Co. v. State*

Corporation Commission, 372 U.S. 84, 91-93 (1963). The question in *Transcontinental* was thus narrowly drawn: whether Congress' restructuring of natural gas regulation in the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301-3432 (1982), called for a result different from that in *Northern Natural*. 474 U.S. at 417.

Under the NGA, the federal government had regulated the prices charged by producers of natural gas. The NGPA revised this regulatory scheme in an effort to balance the desire to hold down the price of flowing gas with the need to encourage the production of newly-discovered gas. As a part of this effort, Congress completely deregulated the first sale price of gas discovered below 15,000 feet ("deep gas") as an incentive to its production.[40] *See* NGPA Sections 107 and 121(b), 15 U.S.C. §§ 3317, 3331(b). Mississippi argued that it was free to regulate this gas because the NGPA had ended federal regulation of such gas. *Transcontinental*, 474 U.S. at 421.

This Court rejected Mississippi's argument. First, the Court noted that the NPGA did not represent a retreat from the federal government's role in establishing a consistent, nationwide natural gas policy. *Id.* 474 U.S. at 421. Rather, the NGPA was a revision of an ongoing "comprehensive federal regulatory scheme." *Id.* at 422.[41] Because the Federal Energy Regulatory Commission ("FERC") continued to regulate the rates of the purchasing pipeline, the Court found that the Mississippi ratable-take order, which would affect such rates, was in conflict with the continuing federal regulatory scheme. *Id.* at 423-24.

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[40] Deep gas was the only one of over 20 categories of gas established by the NGPA deregulated upon its enactment. Some of the categories were to be deregulated later; others remain subject to controls.

[41] While certain aspects of the natural gas regulatory scheme were reduced, the NGPA also expanded federal jurisdiction to include areas previously regulated by the states. *See Transcontinental*, 474 U.S. at 421.

The Court then turned its attention to whether Congress intended to preclude state regulation of deep gas production. The NGPA allocates authority to regulate the natural gas industry between the federal government and the states, with specific grants of regulatory authority to each. *See* Sections 601 and 602, 15 U.S.C. §§ 3431, 3432. In light of these specific grants of regulatory authority, the Court concluded that Congress' removal of federal authority without mention of an appropriate state regulatory role evidenced Congress' continuing intent to preempt state regulation in this narrow area. *Transcontinental*, 474 U.S. at 422-23.

TECA, however, seized upon this Court's analysis of the NGPA's decontrol of deep gas in *Transcontinental* as the enunciation of a new generally applicable proposition that, when Congress removes federal controls, state regulation remains preempted absent a specific congressional grant of power to the states. In so doing, the majority focused on a partial quotation from *Transcontinental*:

> The proper question in this case is not whether FERC has affirmative regulatory power over wellhead sales of § 107 [high cost] gas, but whether Congress, in revising a comprehensive federal regulatory scheme to give market forces a more significant role in determining the supply, the demand, and the price of natural gas, intended to give the States the power it had denied FERC.

Pet. Ap. at 12a (quoting *Transcontinental*, 474 U.S. at 422).

By failing to analyze this Court's response to this question, TECA drew the wrong conclusion from the *Transcontinental* holding. This Court concluded that:

> The answer to the latter question must be in the negative. First, when Congress meant to vest additional regulatory authority in the States it did so explicitly. See §§ 503(c) and 602(a), 15 U.S.C. §§ 3413(c) and 3432(a). Second, although FERC

> may now possess less regulatory jurisdiction over the "intricate relationship between the purchasers' cost structures and eventual costs to wholesale customers who sell to consumers in other States" than it did under the old regime, *that relationship is still a subject of deep federal concern.* FERC still must review Transco's pricing practices, even though its review of Transco's purchasing behavior has been circumscribed. In light of Congress' intent to move toward a less-regulated national natural gas market, its decision to remove jurisdiction from FERC cannot be interpreted as an invitation to the States to impose additional regulations.

474 U.S. at 422-23 (emphasis added) (citations omitted).

As this answer shows, the Court based its decision on traditional preemption analysis. That Congress did not authorize either the federal government or the states to regulate deep gas is obviously indicative of its preemptive intent in the context of a comprehensive statutory scheme that includes a specific allocation of regulatory authority between the federal government and the states. A key feature of the revised national policy was to provide incentives for the production of new natural gas; with respect to high-cost deep gas, Congress decided that it was appropriate to lift price ceilings entirely in order to provide the maximum incentive. Thus, decontrol of this one category of gas was an integral part of the comprehensive statutory scheme.

Furthermore, the Court did not rest its decision on this aspect of the NGPA alone. The Court also found evidence in the statutory scheme as a whole that Congress plainly intended that state law would continue to be preempted so as not to disturb the regulatory "relationship" which "is still a subject of deep federal concern."

Nothing in *Transcontinental* indicates that the Court intended its discussion of congressional intent in the context of the NGPA to reverse the well established pre-

sumption that state law is not preempted absent a clear and manifest congressional intent to preempt. To the contrary, the holding in *Transcontinental* is based on the time-honored principle that Congress may manifest its intent to bar state action by affirmatively deciding not to regulate a specific activity within a larger regulatory scheme. *See Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 384 (1983);[42] *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 177-78 (1978); *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605, 613 (1926). Thus, no new preemption standard was announced in *Transcontinental.*

Moreover, this Court's Supremacy Clause cases subsequent to the *Transcontinental* decision do not even hint at the possibility that *Transcontinental* represented a departure from the Court's traditional preemption analysis.[43] Five months after the *Transcontinental* decision was rendered, this Court stated: "[W]e have consistently emphasized that the first and fundamental inquiry in any preemption analysis is whether Congress intended to displace state law . . . ." *Wardair Canada, Inc. v. Florida Department of Revenue*, 106 S. Ct. 2369, 2372 (1986); *see also Louisiana Public Service Commission v. FCC*, 106 S. Ct. 1890, 1899 (1986). Indeed, this Court has continued to adhere to the principle that "federal regulation of a field of commerce should not be deemed preemptive of state regulation in the absence of persuasive

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[42] Indeed, in *Arkansas Electric*, quoted by this Court in *Transcontinental*, 474 U.S. at 422, it is emphasized that "[t]he relevant inquiry is not whether Congress authorized or expected such regulation, but whether it intended by its own actions to *forbid* it." 461 U.S. at 387 n.11 (emphasis in original).

[43] *See, e.g., CTS Corp. v. Dynamics Corp. of America*, 107 S. Ct. 1637 (1987); *International Paper Co. v. Ouellette*, 107 S. Ct. 805 (1987); *California Fed. Sav. & Loan Ass'n v. Guerra*, 107 S. Ct. 683 (1987); *R.J. Reynolds Co. v. Durham Cty.*, 107 S. Ct. 499 (1986); *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 106 S. Ct. 2369 (1986); *Louisiana Pub. Serv. Comm'n v. FCC*, 106 S. Ct. 1890 (1986).

reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *R.J. Reynolds Co. v. Durham County*, 107 S. Ct. 499, 507 (1986) (quoting *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)).

Accordingly, it is clear that *Transcontinental* did not enunciate a new principle of preemption analysis requiring a different result from *Tully*. In any event, the holding in *Transcontinental* is clearly distinguishable from the issue involved here.

V. The Factual Situation in Puerto Rico Demonstrates Why State Law Should Not Be Preempted.

The need to permit the state governments to respond to their unique problems provides yet another reason why this Court should insist upon a showing of a clear and manifest congressional intent to preempt state regulation. Circumstances which differ among local markets may call for differing approaches to the issue of petroleum price regulation. It is a fundamental precept of a federal system that absent a clear expression of national interest, the states have the sovereign power to make their own choices. Although most states have determined for themselves that their local markets should operate free from any price controls,[44] it is not self-evident that such an approach is always appropriate.

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[44] Although only Puerto Rico appears presently to regulate prices, a number of states regulate other aspects of petroleum distribution. *See* O'Donnell and Glassman, *Energy Emergencies: Constitutional Constraints on State Efforts to Control Oil Supplies and Prices*, 5 Energy L.J. 77 (1984). These actions might well be subject to challenge if TECA's preemption rationale is upheld, for the scope of TECA's "free market" preemption is unclear. As Judge Christensen noted in dissent, "the problems that will be created by judicially declared preemption in the context of the expired EPAA are far-reaching and intractable, as the courts try to solve them without congressional guidance but in view of the declaratory judgment of the district court herein affirmed." Pet. Ap. at 26a.

Puerto Rico is a good example of such a local market. The concentrated nature of the Puerto Rican petroleum refining and wholesale distribution industries, combined with the relatively high barriers to entry,[45] result in a market that does not always respond to market signals in the same way as a more competitive market. As a result, Puerto Rico has traditionally regulated local petroleum prices, both before and after the EPAA. In fact, it was the Puerto Rican market's failure to respond to the decreases in the world oil market in the same manner as in the continental United States that caused DACO to promulgate the orders at issue here. J.A. at 22.

Reversing TECA's decision will not, as TECA feared, Pet. Ap. at 13a-14a, permit over 50 conflicting regulatory schemes to paralyze the workings of the nation's petroleum markets. Most states traditionally have not instituted such regulations. No conflicting web of regulation existed prior to the enactment of the EPAA in 1973 and none has arisen since the expiration of the EPAA in 1981. Further, if any state does enact petroleum price regulations that, unlike the Puerto Rican regulations at issue here, have significant effect beyond the state in question, such regulations would have to withstand a Commerce Clause review to be valid. *See, e.g. Maryland v. Louisiana*, 451 U.S. 725, 753-60 (1981).

Ultimately, however, the questions of whether the states may enact conflicting regulation and the reach of the Commerce Clause are not relevant to the issue before this Court. If there is a threat of conflicting state regulation that poses a problem calling for a national solution, it is up to Congress to address the problem. Congress has not acted to date, however, and in the absence of any statute expressing Congress' intent to preempt state petroleum regulation, Puerto Rico's regulations should not be invalidated under the Supremacy Clause.

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[45] Because neither of the two Puerto Rican refiners has any excess capacity, a new wholesaler would have to import refined gasoline. *See* Transcript, Vol. I at 125; Vol. II at 122. This would require the construction of expensive ship terminal facilities.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioners respectfully request that the TECA decision below be reversed and that the district court injunction against Petitioners implementing new petroleum regulations be vacated.

Respectfully submitted,

LYNN R. COLEMAN *
DOUGLAS G. ROBINSON
MATTHEW W.S. ESTES
SKADDEN, ARPS, SLATE, MEAGHER & FLOM
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

HECTOR RIVERA CRUZ
Secretary of Justice
Commonwealth of Puerto Rico

MARCOS A. RAMIREZ IRIZARRY
DENNIS A. SIMONPIETRI MONEFELDT
RAMIREZ & RAMIREZ
117 Eleanor Roosevelt Avenue
Hato Rey, Puerto Rico 00918
(809) 758-5660

RAFAEL ORTIZ CARRION
Solicitor General
Commonwealth of Puerto Rico

* Counsel of Record

Dated: November 19, 1987
Washington, D.C.

RESPONDENT'S

BRIEF

(19)

In the

Supreme Court of the United States

October Term, 1987

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,
Petitioners

v.

ISLA PETROLEUM CORPORATION, *et al.*,
Respondents

On Writ of Certiorari to the
Temporary Emergency Court of Appeals
of the United States

BRIEF FOR RESPONDENTS

JAIME [illegible]
[illegible]
[illegible]
[illegible]
[illegible]
Hato Rey, Puerto Rico 00917-1906
(809) 764-7000

JOSE E. GONZALEZ MERCADO
MARIA L. PASCUCCIA
SWEETSER, GONZALEZ & CINTRON
Banco Central Building
Suite 402
Hato Rey, Puerto Rico 00917-1884
(809) 764-7150

DONALD B. CRAVEN *
MARK L. EVANS
JAMES P. TUITE
MILLER & CHEVALIER, Chartered
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5701
(202) 626-5800

Attorneys for Respondents
Esso Standard Oil Co. (P.R.)
and Caribbean Gulf Refining
Corporation

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Energy Policy and Conservation Act of 1975—which deregulated petroleum markets to let market forces alone set prices after September 1981—preempts a Puerto Rico regulation that interferes directly with market forces by fixing prices and profit margins on sales of gasoline.

STATEMENT PURSUANT TO RULE 28.1

In addition to the companies listed in the Appendix to the Brief for Respondents in Opposition, pp. 1a-12a, the following companies are now affiliated with Esso Standard Oil Co. (P.R.):

Etablissements Cloarec
Exxon Capital Ventures Inc.
Groupement Petrolier de la Cote D'Azur
Home Energy Company Ltd.
Home Oil Company Limited
Minerals Limited
Mytex Polymes Incorporated
151742 Canada Inc.
158585 Canada Limited
159129 Canada Inc.
P.A.C. S.A.R.L. (Pinson Allegret-Causse)
S.A.R.L. Viain
Scurry-Rainbow Oil Limited

The following companies, which were included on the list set forth in the Appendix to the Brief for Respondents in Opposition, are no longer affiliated with Esso Standard Oil Co. (P.R.):

A.B.C.—Azienda Briantea Carburanti S.r.l.
Abu Dhabi Company for Onshore Oil Operations
A/S Futurum
Association Petroliere, Belge
Azienda Carburanti Lubrificanti Affini, S.p.A.—Milano (ACLAM)
D.O.C. Dutch Offshore Consortium B.V.
Daitsu Sangyo K.K.
Engyealor—Energia Calore S.r.l.
Esso Italiana S.p.A.
Esso Reunion
Exxon Finance N.V.
Exxon S.r.l.

Respondent Caribbean Gulf Refining Corporation is no longer affiliated with the companies listed in the Appendix to the Brief for Respondents in Opposition, pp. 13a-26a. Its parent company is now F.O.I. AG, a Swiss limited liability company. It has no publicly owned subsidiaries or affiliates.

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Transcontinental Gas Pipeline Corp. v. State Oil & Gas Bd., 457 So. 2d 1298 (Miss. 1984), *rev'd*, 474 U.S. 409 (1986)	19
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1406

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,
Petitioners

v.

ISLA PETROLEUM CORPORATION, *et al.*,
Respondents

On Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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BRIEF FOR RESPONDENTS

STATEMENT

In the Energy Policy and Conservation Act of 1975 ("EPCA"), enacted after an extended political debate, Congress for the first time adopted a long-term and comprehensive national energy policy. The core of the debate, and the heart of the legislation, was the deregulation of petroleum markets.

Congress ultimately concluded that government price controls artificially encouraged domestic energy consumption, inappropriately discouraged the development and production of domestic energy resources, and consequently exacerbated the Nation's increasingly dangerous reliance on foreign oil supplies. Recognizing that the world had changed permanently following the 1973 Arab oil embargo, Congress resolved that the Nation's future energy security required exclusive reliance on market forces to determine the price and allocation of crude oil and refined petroleum products. It accordingly amended

the Emergency Petroleum Allocation Act of 1973 ("EPAA") to provide for a gradual phase-out of petroleum price controls over a six-year period leading to complete deregulation in September 1981.

For nearly five years after decontrol, market forces were permitted to operate free of government interference in accordance with the Congressional design. In the spring of 1986, however, the Puerto Rico Department of Consumer Affairs ("DACO"), dissatisfied with the pace at which gasoline prices on the island were declining in response to falling world crude oil prices, adopted a series of orders purporting to regulate directly the prices and gross margins on wholesale and retail sales of gasoline in Puerto Rico. The Temporary Emergency Court of Appeals ("TECA"), applying the principles of *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409 (1986) ("*Transco*"), held that Puerto Rico's gasoline price regulation was preempted under the Supremacy Clause because it "clearly conflicts with and frustrates Congress' goal of allowing market forces to regulate the supply and price of petroleum products." Pet. App. 13a-14a.

A. The Puerto Rico Regulation

Puerto Rico law empowers the Secretary of DACO in specified circumstances to fix "maximum prices or maximum profits" on sales of "staple commodities" in Puerto Rico. 23 L.P.R.A. § 734; 3 L.P.R.A. § 341e(a). In Price Regulation No. 45, as amended in 1976, DACO purported to prohibit price increases on sales of gasoline and other petroleum products except upon 15 days' advance written notice to the Secretary. Pet. App. 37a. The regulation was suspended for the duration of federal price controls and remained largely dormant thereafter until March 1986. Pet. Supp. App. SA12-SA17. In that month, the Puerto Rico Legislature imposed a new excise tax on crude oil and refined petroleum products imported into Puerto Rico. 13 L.P.R.A. § 3040C. The Legislature intended for the petroleum industry to bear the economic

burden of the new tax without passing it on to consumers. Pet. Supp. App. SA21-SA22. To carry out that purpose, DACO issued the series of orders whose validity is at issue in this case.

First, on March 26, in an effort to activate the advance-notice provision of Regulation No. 45, DACO specifically directed each petroleum company to give 15 days' prior notice of any proposed increase in the price of gasoline. Pet. App. 42a-45a.

Second, on April 23, while authorizing refiners to pass through to wholesalers the cost of the new gasoline excise tax, DACO froze wholesale prices at the levels charged on March 31, 1986. A. 7-12.[1] The result, as the District Court found, was that wholesalers were required "to sell below their acquisition cost of gasoline on a current basis." Pet. Supp. App. SA26.

Third, on May 20, after the complaints in this case had been filed and just one day before trial was to begin, DACO rescinded the April 23 price freeze and established in its place a regime of maximum "gross profit margins" for gasoline wholesalers and retailers. A. 21-29. ("Gross profit margins" under the May 20 order meant the difference between selling price and acquisition cost without any consideration of operating and other expenses. A. 24-25.) The order limited wholesalers to a gross margin of 8.6 cents per gallon. Those whose average margins had exceeded 8.6 cents per gallon during 1986 were limited to 3.6 cents per gallon until their average for the year had fallen to 8.6 cents. *Id.*

The May 20 order did not eliminate the confiscatory effects of the April 23 order. Respondent Esso's average operating costs, for example, were 11 cents per gallon. Pet. Supp. App. SA46, SA48. The District Court found that, by limiting Esso's average gross margin to 8.6 cents per gallon for 1986, "[t]he May 20 order had the direct effect of forcing ESSO to sell gasoline to its dealers at

---

[1] "A." refers to the Joint Appendix.

a loss." *Id.* at SA48. *See also id.* at SA51-SA52 (similar findings as to respondent Caribbean Gulf).

B. Proceedings Below

1. All the gasoline refiners and wholesalers in Puerto Rico filed actions in the District Court seeking declaratory and injunctive relief. After a three-day trial, the District Court issued comprehensive findings of fact and conclusions of law. Holding that the DACO orders were repugnant to the United States Constitution, the Court enjoined petitioners from further implementing or enforcing orders fixing gasoline prices or profit margins except in accordance with federal law. Pet. Supp. App. SA86-SA87. The Court rested its decision on two independent grounds.

First, by forcing gasoline wholesalers to operate at a loss, the orders at issue both lacked the minimum rationality required by due process and constituted an impermissible taking without just compensation, in violation of the Fifth or Fourteenth Amendment to the Constitution. Pet. Supp. App. SA57-SA67.

Second, by purporting to regulate gasoline prices and profit margins, the orders unlawfully interfered with the Congressional purpose in the EPCA, which amended the EPAA to provide for gradual but total deregulation of petroleum prices. Pet. Supp. App. SA67-SA86. Congress intended in the EPCA to free petroleum markets from all government regulation—"to let the market forces be the sovereign in this field." *Id.* at SA86. The District Court ruled that, except for emergency local responses to severe petroleum supply disruptions (*see id.* at SA85-SA86), the federal policy of deregulation takes precedence over and preempts state regulation that, by "interfer[ing] with the [petroleum product] pricing system" (*id.* at SA85), stands as "an obstacle to the free market." *Id.* at SA76.

2. Petitioners filed concurrent appeals to TECA and to the United States Court of Appeals for the First Circuit. TECA exercised exclusive jurisdiction over the preemption issue, because the resolution of that issue requires an interpretation of the EPAA as amended by the EPCA. Pet. App. 4a-6a. The First Circuit, which has jurisdiction over the remaining issues on appeal, subsequently stayed its own proceedings pending final disposition of this case.

TECA affirmed. The Court concluded that Congress, when it decided in the EPCA to end federal petroleum price control authority, determined "that the best mechanism to combat supply disruptions and the country's reliance on imported oil was to allow market forces to operate freely." Pet. App. 13a. The situation was therefore parallel to that in *Transco*, where deregulation "was part of a federal scheme to rely on market forces to determine the supply and price of natural gas." Pet. App. 12a. TECA found that in this case, no less than in *Transco*, "the federal decision to forgo regulation implies 'an authoritative federal determination that the area is best left *un*regulated.'" Pet. App. 12a. In neither case did Congress "intend to give the states the power it had denied the federal government." *Id.* On the contrary, here as in *Transco* "Congress intended to establish markets free of any government interference." *Id.*

Employing traditional principles of "conflict" preemption, TECA concluded that the Puerto Rico regulation collides with and therefore must give way to the EPCA's paramount federal policy of deregulation. Just as in *Transco*, where "Congress' decision to rely on market forces pre-empted state and local regulation which interfered with those market forces" (Pet. App. 12a), in this case "Congress' goal of letting market forces set prices and allocate petroleum products" preempts "DACO's price controls" which likewise "interfere with and obstruct" market forces. Pet. App. 17a.

The dissenting judge did not dispute the majority's conclusion that Congress in the EPCA intended market

forces alone to set petroleum prices after September 1981. Nor did he deny that the Puerto Rico price-fixing regulation directly interfered with market forces. In his view, however, that was not enough to sustain preemption. He would have required evidence that Congress expressly considered the role of the states and specifically decided to prohibit them from interfering with market forces. Pet. App. 20a-21a. He sought to distinguish *Transco*, in which this Court had reached the opposite conclusion, on the ground that the deregulation in that case was partial rather than total and that the decision, properly understood, involved preemption by regulation, not deregulation. Pet. App. 24a-26a.

TECA subsequently denied, without dissent, a petition for rehearing and suggestion for rehearing *en banc*. Pet. App. 28a.

SUMMARY OF ARGUMENT

I.

Under the Supremacy Clause, "the Laws of the United States" supersede the "Laws of any State to the Contrary." U.S. Const. art. VI, cl. 2. This Court has long held that state law is "contrary" to federal law, and is therefore preempted, if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The question in this case is whether Puerto Rico's gasoline price regulation is preempted because it impermissibly frustrates the purpose of Congress in deregulating petroleum markets.

This Court's decision in *Transco*, which considered for the first time the preemptive effect of federal deregulation, dictates the framework for analysis. Congress there had terminated federal regulatory jurisdiction over wellhead sales of certain categories of natural gas but had said nothing about future state regulation. Mississippi argued, as petitioners argue here, that federal deregulation freed the state to resume the exercise of its historical police powers. This Court held, however, that a federal deregulatory statute, no less than a regulatory statute, preempts state law that interferes with its objectives.

In *Transco*, Congress had ended federal regulation in the belief that price controls were distorting natural gas supply and demand and that the best solution was to let price "be determined by market forces." 474 U.S. at 422. The Court held that Mississippi's regulation "impermissibly intrude[d] upon federal concerns" because it "threaten[ed] to distort the market once again," thereby "postpon[ing] achievement of Congress' aims." *Id.* at 422, 424, 425.

TECA faithfully applied the *Transco* analysis. Looking first to the Congressional objectives underlying federal petroleum deregulation, TECA found that Congress terminated the federal program in the belief that exclusive reliance on market forces was "the best mechanism to combat supply disruptions and the country's reliance on imported oil." Pet. App. 13a. Puerto Rico's gasoline price regulation was therefore invalid under the Supremacy Clause because it "clearly conflicts with and frustrates Congress' goal of allowing market forces to regulate the supply and price of petroleum products." Pet. App. 13a-14a.

A. Petitioners and their supporting amici argue that TECA applied the wrong preemption standard. In their view, when an Act of Congress terminates all federal regulation of a commodity, even if the legislative objective is to permit market forces to operate free of all government interference, the statute cannot preempt state price-fixing regulation unless Congress has clearly manifested a specific "intent to preempt" state law. But under the plain terms of the Supremacy Clause, and under the *Hines v. Davidowitz* standard of conflict preemption, federal law automatically supersedes "contrary" state law that frustrates the federal legislative objectives. Only if Congress wishes to occupy the entire field, foreclosing not only conflicting but even complementary

state regulation, must it express a specific preemptive intent.

Petitioners' insistence on a Congressional "intent to preempt" is at war with this Court's analysis in *Transco*. There was no evidence in that case that Congress had specifically intended to preempt state regulation following federal deregulation. As in this case, the state regulation there was nevertheless preempted because it interfered with the substantive free-market purposes underlying the federal legislation.

Transco cannot fairly be confined to cases of partial deregulation. The key to its analysis is not the scope but the purpose of federal deregulation. If Congress has chosen to rely solely on market forces to accomplish its legislative goals, the federal statute preempts state laws that intrude upon market forces regardless of whether Congress preserved other aspects of the federal regulatory scheme.

Contrary to petitioners' assertion, TECA did not reverse the usual presumption against federal preemption. It properly determined, without the aid of any presumption, that Congress intended market forces to operate freely in setting petroleum prices and that Puerto Rico's regulation directly obstructs the operation of market forces. TECA further asked, just as this Court had asked in *Transco*, whether Congress nonetheless intended to leave the door open for state price regulation. As in *Transco*, TECA found that there was no evidence of such intent. It accordingly concluded that Puerto Rico's gasoline price regulation, like Mississippi's natural gas regulation, is contrary to federal law, and therefore invalid under the Supremacy Clause, because it interferes with the accomplishment of federal statutory purposes.

B. Congress deregulated petroleum markets because it concluded that price controls were stimulating energy consumption, depressing domestic production, and consequently increasing our dependency on unstable foreign oil supplies. It thus terminated the federal regulatory pro-

gram, not because it had lost interest in energy problems, and not because it thought that state and local officials could more effectively police petroleum markets, but because it concluded that the best way to fortify our national security and foster energy independence was to allow the market mechanism to send proper price signals to consumers and producers. To minimize short-term economic dislocations, Congress chose in the EPCA to move gradually over a six-year period from the pervasive scheme of federal price regulation under the EPAA to a free-market pricing system after September 1981.

The Congressional purpose is reflected not only in the terms and structure of the EPCA, which amended the EPAA to phase out price controls in carefully calibrated stages, but also in the extensive legislative history, which demonstrates a classic political compromise between President Ford and Congress. The debate raged vigorously for nearly a full year, the President seeking swift removal of price regulation in the interest of national energy security and Congress insisting that rapid decontrol would endanger the Nation's emerging recovery from recession. In the end, the executive and legislative branches broke the deadlock and agreed to the gradual decontrol program adopted in the EPCA. President Ford accepted a more extended phase-out period than he preferred. In return, Congress agreed to President Ford's demand that the statute provide for the complete removal of regulatory interference in petroleum markets.

None of the theories on which petitioners and their amici rely can overcome the force of this plain legislative purpose. First, as in *Transco*, it is "artificially formalistic" to suggest that the EPCA merely ended federal controls and had no effect on state regulation. 474 U.S. at 424 n.6. The Congressional purpose—letting the marketplace send proper price signals to consumers and producers—would be defeated no less by a patchwork of state price controls than by uniform federal price controls.

Second, Congress did not choose simply to restore the pre-1973 *status quo*. On the contrary, it recognized repeatedly that the 1973 Arab oil embargo had permanently altered the Nation's energy security, precluding future reliance on decentralized policymaking and requiring instead a long-term national energy policy centered on unregulated petroleum markets. The EPCA embodied that policy.

Third, petitioners' collection of *post hoc* Congressional statements from the period after 1981 reveals only that some legislators supported new legislation to ensure that states would be barred from regulating petroleum prices following federal deregulation. It does not contradict in any way the 1975 Congressional purpose, embodied in the EPCA, to achieve energy markets free of government interference. Many of the comments can be traced to statements by TECA and this Court, in litigation that concerned the period prior to September 1981, suggesting that federal concerns would come to an end upon termination of federal regulatory authority. Neither Court, however, had considered the long-term free-market purposes underlying the EPCA, and Congressional efforts to overcome the implications of the judicial statements hardly signify an endorsement of the underlying premise.

C. Puerto Rico's gasoline price regulation, far more clearly than Mississippi's regulation in *Transco*, directly interferes with the operation of market forces and frustrates the Congressional objectives. Puerto Rico cannot excuse itself from the preemptive scope of federal law on the ground that it has "unique problems" calling for solutions different from those chosen by Congress. Pet. Br. 46. Under the Supremacy Clause, "[t]he relative importance to the State of its own law is not material where there is conflict with a valid federal law." *Free v. Bland*, 369 U.S. 663, 666 (1962).

II.

This Court's decision in *Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982), does not preclude a proper resolution

of the preemption issue in this case. The focus of that litigation was on the period prior to September 1981. TECA had held that state petroleum price regulation was preempted as long as the President's regulatory authority remained in place. When the case reached this Court, the President's authority had ended under the EPCA phase-out. This Court summarily vacated and remanded because the injunction affirmed by TECA continued beyond the date that TECA's analysis justified. While this Court's opinion assumed, as TECA had assumed, that state regulation would not be preempted after September 1981, no party had briefed the question, and this Court's opinion did not address the EPCA legislative purpose or its implications for preemption after 1981.

This Court does not ascribe preclusive precedential force to a prior decision if the question at issue, while "lurk[ing] in the record, [was] neither brought to the attention of the court nor ruled upon." *Webster v. Fall*, 266 U.S. 507, 511 (1925). Particularly in light of this Court's subsequent decision in *Transco*, which confirmed that the 1975 Congressional intent is the controlling issue in this case, *Tully* should not be read to bar consideration of that question here.

ARGUMENT

I. PUERTO RICO'S GASOLINE PRICE REGULATION IS PREEMPTED BY THE ENERGY POLICY AND CONSERVATION ACT OF 1975, IN WHICH CONGRESS DETERMINED THAT MARKET FORCES ALONE SHOULD GOVERN THE PRICE AND ALLOCATION OF PETROLEUM PRODUCTS AFTER SEPTEMER 1981

A. In the Case of Federal Deregulation, a Congressional Purpose to Let Market Forces Operate Freely Preempts State Regulation that Interferes with Market Forces

This Court held in *Transco* that federal deregulation, if intended to let market forces alone govern the price of the deregulated product, preempts state law that inter-

feres with the operation of market forces. Petitioners nevertheless argue here that federal deregulation, even if designed to achieve a free market, opens the door to state regulation unless Congress has acted affirmatively to exclude the states from the field. Petitioners' argument not only clashes with *Transco* but also fundamentally misconceives the conflict preemption jurisprudence from which *Transco* springs.

1. *State Regulation Is Preempted if It Frustrates the Purpose and Objective of Congress*

Federal preemption derives from the Supremacy Clause, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the . . . Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. In one of the earliest preemption cases, this Court, speaking through Chief Justice Marshall, held that state laws, "though enacted in the exercise of powers not controverted, must yield" under the Supremacy Clause if they "interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824). Although preemption doctrine has evolved substantially in the years since *Gibbons v. Ogden*, the Court has never departed from the fundamental rule announced in that case. Today, no less than in 1824, federal law supersedes state law that interferes with or is contrary to the federal legislative purpose.

This Court's more recent decisions recognize two general categories of preemption. First, under the doctrine of "field" preemption, "[i]f Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Second, under the the principle of "conflict" preemption, "[i]f Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law." *Id.* Such a conflict may be found in either of two situations: "when it is impossible to comply with both state and federal law,

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)." *Silkwood*, 464 U.S. at 248.

This case involves the *Hines v. Davidowitz* branch of conflict preemption. The *Hines* standard, a direct descendant of *Gibbons v. Ogden*, represents "a basic underpinning of our federal system," *Louisiana Public Service Comm'n v. FCC*, 106 S.Ct. 1890, 1901 (1986), and a definitive "articulation of the meaning of the Supremacy Clause." *Perez v. Campbell*, 402 U.S. 637, 649 (1971). It entails a two-step inquiry into the *purpose* of the federal statute and the *effect* of the state law. *Id.* at 649-52. If the state regulation, in its practical operation, frustrates "the accomplishment and execution of the full purposes and objectives of Congress" (*Hines*, 312 U.S. at 67), it "is rendered invalid by the Supremacy Clause" (*Perez*, 402 U.S. at 652), regardless of whether Congress intended to displace state law (or even thought about the issue) and regardless of whether the state legislature intended to interfere with federal law. *Id.* at 651-52.

Petitioners do not openly challenge the *Hines v. Davidowitz* standard. On the contrary, they acknowledge that state regulation is preempted if it "is found to be an obstacle to the full accomplishment of congressional purpose." Pet. Br. 12. But because a straightforward application of that principle does violence to their case, petitioners seek to sidestep *Hines* in three discrete ways, none of which succeeds.

a. In a theme that colors their entire approach to the case, petitioners confuse the *substantive* Congressional purpose protected under the *Hines* standard of conflict preemption with the *preemptive* purpose required to establish field preemption. Under either principle, "Congressional purpose is of course '"the ultimate touchstone"' of preemption analysis." *Wisconsin Dep't of Industry v. Gould Inc.*, 106 S. Ct. 1057, 1063 (1986), *quoting Retail*

Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963). But the focus of the question depends on the scope of the resulting preemption. When the claim is that Congress has occupied an entire field of regulation, effectuating a "complete ouster of state power—including state power to promulgate laws not in conflict with federal laws," *De Canas v. Bica*, 424 U.S. 351, 357 (1976), the Court requires evidence that it was "the clear and manifest purpose of Congress" to preempt all state law in the area. *Id.*; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). By contrast, when the claim is that state law conflicts with federal law, the Court asks, not whether Congress specifically intended to preempt state law, but whether the state regulation interferes with the substantive purpose of the federal legislation. *Perez v. Campbell*, 402 U.S. at 648, 652.

The distinction flows directly from the self-executing language of the Supremacy Clause, which makes federal law supreme notwithstanding "any Thing in the . . . Laws of any State to the Contrary." If Congress wishes to prohibit even harmonious state law, it must make that intention clear, because the Supremacy Clause by itself would not otherwise accomplish that result. But nothing in the constitutional text requires Congress to exhibit a specific preemptive intent in order to supersede "contrary" state law. As the Framers may well have envisioned, "Congress, embroiled in controversy over policy issues, rarely anticipates the possible ramifications of its acts upon state law." Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 Stan. L. Rev. 208, 209 (1959). The Supremacy Clause accordingly ensures that, when Congress legislates within the scope of its constitutional authority, its enactment automatically displaces any state law that obstructs the federal purpose. The proper question in such a case is not "whether there was a specific congressional intent to supersede state law," but "whether the coexistence of state law is compatible with the general purpose of the federal legislation involved." *Id.* at 208.

Petitioners' brief is riddled with the mistaken assumption that the *Hines* test requires evidence of a specific "congressional intent to preempt." *E.g.*, Pet. Br. 3, 12, 13, 16, 17, 18, 19, 22, 24, 34, 36, 41, 43. But we know of no case, and petitioners cite none, in which this Court has ever rejected preemption under the *Hines* standard on the ground that Congress had no conscious preemptive purpose. On the contrary, the Court has found state law preempted under that test without any evidence that Congress even thought about state law, much less demonstrated a specific intention to displace it. *E.g.*, *Michigan Canners & Freezers Ass'n v. Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461, 470-78 (1984); *Perez v. Campbell*, 402 U.S. at 648; *Hill v. Florida*, 325 U.S. 538, 541-43 (1945).

Petitioners' attempt to inject into the *Hines* standard a new requirement of specific preemptive intent resembles the discredited theory of *Kesler v. Department of Public Safety*, 369 U.S. 153 (1962), and *Reitz v. Mealey*, 314 U.S. 33 (1941). The Court in those cases upheld state statutes, despite their interference with Congressional objectives, on the ground that the state legislature had a valid regulatory purpose unrelated to the circumvention of federal law. In *Perez v. Campbell*, the Court overruled *Kesler* and *Reitz*, repudiating "the aberrational doctrine . . . that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration." 402 U.S. at 651-52.

Petitioners' approach is equally aberrational. Under the principle they espouse, state law may frustrate the operation of federal law as long as Congress had no conscious purpose to prohibit the states from interfering with federal statutory objectives. But a federal preemptive intent is no more a proper element of conflict preemption than is a state obstructive intent. Each is "inconsistent with the controlling principle that any state legislation which frustrates the full effectiveness of federal law is

rendered invalid by the Supremacy Clause." *Perez*, 402 U.S. at 652.

b. Petitioners argue that an express preemption clause enacted as part of the EPAA defines the full reach of federal preemption and therefore obviates the *Hines* test. Pet. Br. 12-13, 25; *see* US Br. 12-13. The EPAA provision on which they rely specifies that regulations issued under the Act preempt conflicting state regulations. 15 U.S.C. § 755(b). Because the federal regulations have long since been rescinded, according to petitioners, there is now nothing with which state regulations can conflict. In their view, that should end the matter. "The language of the statute itself," they believe, "plainly indicates that Congress intended that state regulation be preempted only while the authority to regulate at the federal level was in effect." Pet. Br. 12-13.

But petitioners overlook *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), in which the Court ruled that the inapplicability of an express preemption clause does *not* foreclose preemption under the *Hines* standard. The Court in that case first determined that the state law at issue did not fall within the scope of an express preemption clause similar to the EPAA provision. It then stated: "That holding does not, however, resolve this case, for we still must determine whether the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* at 540-41, *quoting Hines v. Davidowitz*, 312 U.S. at 67. The Court went on to hold that the state regulation impermissibly interfered with the Congressional design and was therefore preempted. 430 U.S. at 541-43.

The same principle applies here. The EPAA's express preemption clause cannot insulate Puerto Rico's regulation from scrutiny under the *Hines* standard. While the Puerto Rico law may not conflict with any current federal petroleum regulations, it is nevertheless invalid if it frustrates the Congressional purpose behind federal deregulation.

c. In what emerges as the central issue in this Court, petitioners, here joined by all their amici, argue that the *Hines* standard of conflict preemption should not be applied in the case of federal deregulation. A Congressional purpose to let market forces operate freely is not a sufficient basis, in their view, to foreclose state regulation in the wake of federal deregulation. Petitioners would require an explicit "congressional expression of intent" to supersede state law. Pet. Br. 15. The Solicitor General likewise believes that Congress must "affirmatively prohibit state regulation" if it wants market forces to operate without state interference. US Br. 17. The National Governors' Association states the contention most forthrightly: "[W]hen Congress withdraws federal regulation in an area of traditional state authority, without an explicit statement of continued preemption, state power [should be] restored intact." NGA Br. 7.

This Court rejected a nearly identical argument in *Transco*, a point to which we turn in a moment. *Transco* aside, however, there is no foundation in logic or precedent for the notion that a deregulatory Act of Congress should be accorded less preemptive force under the Supremacy Clause than a regulatory enactment. Each constitutes a "Law of the United States" and therefore supersedes contrary state law. A state should have no greater freedom to frustrate federal statutory objectives merely because Congress sought to achieve its goals through deregulation rather than regulation. Nor should Congress be saddled with any special burdens in order to ensure the nationwide effectiveness of its deregulatory legislation.

The Court has always recognized that its first task in applying the *Hines* test is "ascertaining the construction" of the statutes at issue. *Perez v. Campbell*, 402 U.S. at 644. Experience suggests that "[i]n the great majority of cases the pre-emptive implications of [a] federal statute must be derived without the aid of specific legislative guidance." Note, *supra*, 12 Stan. L. Rev. at 210. It would no doubt facilitate the work of the judicial branch if Congress were required in every statute to spell

out precisely which state laws are to be preempted. But that is not the structure of the Supremacy Clause. Congress need not enact an express preemption provision to make its legislation "the supreme Law of the Land." The Supremacy Clause itself gives the legislation that character, and it does so without regard to whether the enactment expands or contracts federal regulation.[2]

2. *As this Court Held in* Transco, *a Federal Decision to Terminate Regulatory Authority Is Preemptive if It Implies a Decision to Leave the Area Unregulated*

a. As early as *Gibbons* v. *Ogden*, the Court recognized that the power of Congress to regulate a matter comprehends the power to leave it unregulated, and that the federal purpose may be "as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated." 22 U.S. (9 Wheat.) at 209. In more recent times, the Court has expressed the rule this way: "[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate." *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 384 (1983) (emphasis in original). *See also Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 774 (1947).

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[2] This Court held in a different context that the validity of an administrative agency's "deregulatory action" must be measured by the same criteria that apply to the promulgation of "a new standard." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42 (1983). There is no more reason in this context than in that one for treating deregulation differently from regulation. Just as "the direction in which an agency chooses to move does not alter the standard of judicial review established by law" (*id.*), so too the direction in which Congress chooses to move should not alter the preemptive effect of its legislation under the Supremacy Clause.

It was not until *Transco*, however, that this Court specifically considered the preemptive effect of federal deregulation. At issue in that case was the validity of a Mississippi "ratable-take" order requiring a pipeline to purchase natural gas proportionally from all the owners of a common pool. The Court had held in a prior decision that a similar ratable-take order was preempted because it "invade[d] the exclusive jurisdiction which the Natural Gas Act has conferred upon the Federal Power Commission over the sale and transportation of natural gas in interstate commerce for resale." *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84, 89 (1963). In the Natural Gas Policy Act of 1978, however, Congress revoked the jurisdiction of the FPC's successor agency, the Federal Energy Regulatory Commission, to regulate wellhead sales of certain categories of natural gas, including "high-cost" gas. Mississippi accordingly argued, just as petitioners argue here, that the termination of federal regulatory authority removed the only barrier to the state's exercise of its historical police powers, leaving no federal jurisdiction with which the ratable-take order could conflict. 474 U.S. at 421.

The Mississippi Supreme Court agreed with the state. *Transcontinental Gas Pipeline Corp. v. State Oil & Gas Bd.*, 457 So.2d 1298 (Miss. 1984), *rev'd*, 474 U.S. 409 (1986). It recognized at the outset that Congress wanted to free wellhead sales of high-cost gas from "regulation and price controls," which had been "stifling production," and it acknowledged that "a plethora of state regulations varying from jurisdiction to jurisdiction seems equally capable" of producing the same undesirable result. 457 So.2d at 1317, 1318. But, following the same analytical path that petitioners retrace here, the Mississippi court could find "no explicit preemptive language" in the NGPA and "no point of actual conflict" between the state's ratable-take order and any remaining federal jurisdiction. *Id.* at 1317. While "Congress certainly had the authority" to provide, as part of its "federal plan of deregulation," that wellhead sales of high-cost gas "should

be free of state regulation," the court saw no evidence of any affirmative Congressional determination "that wellhead prices of deregulated gas [must] be left unregulated by the states as well." *Id.* at 1318. The court explained, in language that might easily fit in the brief of petitioners or any of their amici in this case: "However consistent a continued proscription on state regulation might have been with the theoretical underpinnings of deregulation, the Congress in NGPA in 1978 did not ban state regulation of deregulated gas." *Id.*

When the case reached this Court on appeal, Solicitor General Lee submitted an amicus brief supporting preemption. His principal argument was that the state court had applied the wrong standard. In his view, because Congress had decided in the NGPA to "subject certain wellhead sales to the free play of economic forces, its decision is entitled to preemptive force as against state efforts to regulate the area." Brief for the United States and the Federal Energy Regulatory Commission at 13. Solicitor General Lee acknowledged that "the NGPA does not, in so many words, bar state control over wellhead sales in interstate commerce." *Id.* at 15. Relying on the *Hines v. Davidowitz* standard, however, he argued that the ratable-take order at issue was preempted because it "significantly frustrates the free market policies embodied in the NGPA." *Id.* at 14.[3]

This Court agreed. It held, in response to the state's argument, that "[t]he proper question in this case is not whether FERC has affirmative regulatory power over wellhead sales of [high-cost] gas, but whether Congress, in revising a comprehensive federal regulatory scheme to give market forces a more significant role in determining the supply, the demand, and the price of natural gas, intended to give the States the power it had denied

[3] Solicitor General Lee argued alternatively that, even if the NGPA's free-market purpose were not itself preemptive of state regulation, the order at issue would be invalid because it conflicted with FERC's continuing regulatory jurisdiction over matters other than wellhead sales. Brief at 17-26.

FERC." 474 U.S. at 422. Rejecting the Mississippi Supreme Court's theory that federal deregulation can preempt state regulation only if Congress expressly so provides, this Court concluded that the state's ratable-take order "impermissibly intrude[s] upon federal concerns" because it "directly undermines Congress' determination that the supply, the demand, and the price of high-cost gas be determined by market forces." *Id.*[4]

The dissenting Justices, while differing with the Court over whether the ratable-take order interfered with market forces, agreed with the majority's formulation of the applicable preemption standard. They stated: "The purpose of the NGPA with respect to high-cost gas is to eliminate governmental controls on the wellhead price of such gas. State regulation that interferes with this purpose is preempted." *Id.* at 432-33 (footnote omitted). Like the majority, the dissenting Justices believed that "the congressional desire to *de*control prices uniformly throughout the Nation includes an intent to prevent States from enacting regulation to *re*control them." *Id.* at 435 n.6 (emphasis in original).

b. *Transco* thus establishes the principle, consistent with the *Hines* standard, that a deregulatory statute, like a regulatory statute, preempts state law that impedes the accomplishment of the underlying Congressional purpose. If Congress removes federal regulation because it wishes simply to withdraw from the field, leaving the

[4] The majority opinion, like Solicitor General Lee's brief, buttressed its preemption holding by reference to FERC's residual authority over aspects of the natural gas industry other than sales at the wellhead. 474 U.S. at 423-24. It returned, however, to its central point. It held that the NGPA's deregulation "rested in significant part on the belief that direct federal price control exacerbated supply and demand problems by preventing the market from making long-term adjustments" and that the state's "actions threaten to distort the market once again by artificially increasing supply and price," thereby "postpon[ing] achievement of Congress' aims in enacting the NGPA." *Id.* at 424-25. The Court "therefore conclude[d] that Mississippi's ratable-take order is pre-empted." *Id.* at 425.

area to local control, state regulation obviously does not frustrate the federal legislative design. But if, as in *Transco*, Congress deregulates because it has decided that federal goals can best be met by giving market forces free reign, state laws that interfere with market forces "undermine" the legislative purpose and are consequently preempted under the Supremacy Clause.

That simple rule, embraced by all nine Justices in *Transco* and faithfully applied by TECA in the present case, is a straightforward application of traditional conflict preemption principles. Petitioners and their amici, however, reject that rule and, like the state in *Transco*, insist that nothing short of an affirmative prohibition can bar the states from stepping in when Congress ends federal regulation. Their argument proceeds on two broad fronts.

First, ignoring the thrust of this Court's analysis in *Transco*, they argue that Mississippi's ratable-take order was preempted, not because it impeded the free-market objectives of federal deregulation, but because it conflicted with continuing aspects of the federal regulatory program. Pet. Br. 42; US Br. 18. We read *Transco* differently. The Court there focused, as did Solicitor General Lee, principally on the NGPA's deregulation of wellhead sales and only secondarily on FERC's residual jurisdiction over other aspects of the natural gas industry. It was the free-market objective of deregulation, more than the agency's continuing regulatory jurisdiction, with which the Mississippi regulation interfered. The Court's opinion strongly suggests that preemption was predicated chiefly on the Congressional decision "to leave determination of supply and first-sale price to the market." 474 U.S. at 422.

Second, petitioners argue that federal deregulation designed to achieve a free market can preempt state regulation interfering with the free market only where a broad federal regulatory program remains largely in place. Pet. Br. 44. As the Solicitor General puts it, the

Transco analysis should be confined to cases involving "[a] comprehensive federal regulatory scheme within which one area has been deliberately left unregulated." US Br. 19.

The distinction is an empty one. As we develop below, the statute here, like that in *Transco*, establishes a continuing comprehensive federal scheme, a central feature of which is reliance on market forces. The Congressional decision in the EPCA to leave petroleum markets unregulated was no less deliberate than the decision in the NGPA to leave the wellhead price of high-cost natural gas unregulated. The only difference is that, whereas the NGPA *partially* deregulated the wellhead price of natural gas, the EPCA *totally* deregulated petroleum price and allocation. The argument thus reduces to an assertion that partial deregulation should have greater preemptive effect than total deregulation. But that is backwards. Total deregulation ordinarily reflects a stronger, not weaker, reliance on market forces and to that extent should exert greater, not lesser, preemptive force.

The Solicitor General's theory, moreover, would produce bizarre consequences. According to his standard, the state's ratable-take order in *Transco* would not have been preempted if Congress, to achieve an even broader reliance on market forces, had totally rather than partially deregulated natural gas price and supply. Likewise, the Solicitor General would support TECA's decision in this case if Congress, instead of deregulating all petroleum products, had terminated only gasoline price controls while retaining federal regulatory authority over other refined products. There is no logic to these results. The proper question is not whether federal deregulation is total or partial but whether its purpose is to let market forces govern price. If free-market pricing is the means by which Congress sought to achieve its legislative objectives, the federal statute preempts state price regulation regardless of whether other aspects of federal regulation have been preserved.

c. The Solicitor General's position in this case represents a sharp departure from the views expressed by his predecessor less than three years ago in *Transco*. Solicitor General Lee argued, and the Court agreed, that a federal decision to subject price to "the free play of economic forces . . . is entitled to preemptive force as against state efforts to regulate the area," even though the federal statute "does not, in so many words, bar state control." *Transco* Br. 13, 15. In this case, by contrast, the Solicitor General argues that a federal decision to subject petroleum prices to the free play of economic forces should not be given preemptive effect against state price regulation because Congress did not "affirmatively prohibit state regulation" or "affirmatively indicate[]" a specific preemptive intention. US Br. 17. Though he claims that the total deregulation at issue here gives the case a completely different character, he does not explain why that difference nullifies the *Transco* standard and warrants insistence on an explicit statement of preemptive intent.

At bottom, it appears that the Solicitor General is dissatisfied with the conflict preemption standard that his predecessor advocated and that the Court applied in *Transco*. His turnabout on this issue corresponds to the recommendations contained in a Report issued recently by the Administration's Working Group on Federalism, *The Status of Federalism in America* (Nov. 1986).[5] In its section on preemption (*id.* at 37-42), the Report singled out for particular criticism this Court's implied and conflict preemption principles in "cases where the federal enactment is silent as to its preemptive effect." *Id.* at 38. According to the Report, "there is little question that the courts have improperly invalidated constitutional exercises of state sovereign authority." *Id.* at 38, 42. Included among the Working Group's proposed "reforms to promote federalism" was a recommendation to "[a]dvance pro-federalism positions

[5] We have lodged a copy of the Report with the Clerk.

through litigation." *Id.*, Executive Summary at 6, 9. In the case of preemption, the proposal stated: "Arguments that a federal statute or administrative regulation preempts state law should be advanced only if the law or regulation by its terms preempts state law (or there is some other firm and palpable evidence compelling the conclusion that Congress intended preemption of State law), or if the requirements of state law are irreconcilable with the requirements or express purposes of that federal law or regulation." *Id.*[6]

The Solicitor General's brief in this case is consistent with the Report's conclusions and recommendations. It is not, however, consistent with this Court's decision in *Transco*. Neither the Administration's disapproval of the *Hines* standard of conflict preemption nor the Solicitor General's disaffection from the principles established so recently in *Transco* provides a sufficient reason for this Court to reconsider those principles in this case.

3. *TECA Correctly Applied the Principles of Transco*

A pervasive theme of petitioners' case, echoed by the amici, is that TECA misapplied *Transco*. We are told again and again, as if mere repetition could make it so, that TECA improperly "revers[ed] the traditional presumption against the preemption of state laws" and announced "a new generally applicable proposition that, when Congress removes federal controls, state regula-

[6] On October 26, 1987, based on the Working Group's recommendations, President Reagan adopted an Executive Order on "Federalism." Exec. Order No. 12,612, 52 Fed. Reg. 41,685 (1987). In its section on "Special Requirements for Preemption," the Order provides that, "[t]o the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute." 52 Fed. Reg. at 41,686.

tion remains preempted absent a specific congressional grant of power to the states." Pet. Br. 10, 43. To the same effect, see Pet. Br. 3, 11, 15, 41, 45, 46; US Br. 17, 18, 20 n.8; NGA Br. 2, 5, 6, 17-19; NY Br. 2, 6.

TECA did no such thing. The language in its opinion on which petitioners and the amici rely for their attack was drawn directly from this Court's opinion in *Transco*. TECA quoted (Pet. App. 12a) this Court's statement that the proper question in *Transco* was "not whether FERC has affirmative regulatory power," but whether Congress, in revising the federal scheme "to give market forces a more significant role . . . , intended to give the States the power it had denied FERC." 474 U.S. at 422. At the same time, TECA correctly recognized that this Court's central holding in *Transco* was that "Congress' decision to rely on market forces pre-empted state and local regulation which interfered with those market forces." Pet. App. 12a.

That is the standard that guided TECA's inquiry. It found, based on a careful review of the EPCA and its legislative history, and unaided by any presumption, that "Congress felt that the best mechanism to combat supply disruptions and the country's reliance on imported oil was to allow market forces to operate freely." Pet. App. 13a. TECA accordingly invalidated Puerto Rico's gasoline price regulation, just as this Court had invalidated Mississippi's ratable-take order, because the regulation "clearly conflicts with and frustrates Congress' goal of allowing market forces to regulate the supply and price of petroleum products." Pet. App. 13a-14a.

Petitioners' unrelenting assault on TECA's analysis is thus altogether misguided. Neither TECA below nor this Court in *Transco* erected a "presumption in favor of continued preemption." Pet. Br. 10. On the contrary, what this Court said, and what TECA repeated, is that a Congressional decision to remove federal regulation preempts state regulation if the purpose of deregulation

is "to leave determination of supply and . . . price to the market." 474 U.S. at 422. Of course, Congress is always free to negate the normal preemptive effect of its legislation by indicating that even contrary state law should not be overridden. That is the context in which both this Court and TECA asked whether Congress, despite its free-market objective, nevertheless intended to permit states "to impose additional regulations." *Id.* at 423. Neither in *Transco* nor here was there any evidence of such an intention, and the states were consequently foreclosed from adopting regulations that impede the operation of market forces.

B. In Enacting the EPCA, Congress Decided that Market Forces, Not Government Regulation, Should Determine the Price of Petroleum Products

In the EPCA, Pub. L. No. 94-163, 89 Stat. 871 (1975), Congress adopted a comprehensive program designed to fortify the Nation's long-term energy security and to enhance the efficient allocation of scarce natural resources. The Act provided for the phased decontrol of petroleum prices and, ultimately, the complete lifting of all regulatory authority in September 1981. In petitioners' view, that decontrol scheme was intended to do no more than establish a timetable for the removal of federal controls. But the terms and structure of the EPCA, together with its underlying legislative history, reveal an unequivocal Congressional purpose to accomplish much more. Congress sought to establish a long-range policy of free-market pricing to promote the Act's overall objective of energy independence.

1. *The Terms and Structure of the Statute Strongly Imply a Commitment to the Free Market After September 1981*

The five separate titles of the EPCA establish far-reaching policies and standards on a wide array of energy topics. They aspire to the common goals of reducing energy consumption, increasing domestic production, and strengthening the Nation's energy security. The

cornerstone of the Act—and the principal focus of this litigation—is Title IV.[7]

Title IV manifested Congress's decision to move, over time, to unregulated petroleum markets. Section 461 added a new section 18 to the EPAA and established a three-stage program for the incremental contraction and ultimate elimination of the previously pervasive system of petroleum regulation. First, mandatory price and allocation regulations were to remain in effect for 40 months, during which time the President was authorized to exempt certain products from regulation subject to a one-house Congressional veto. *See* EPCA §§ 401, 455, 551; 15 U.S.C. §§ 757(e), 760a(c); 42 U.S.C. § 6421. Second, the President was thereafter given discretion for a period of approximately 30 months to maintain, amend, or withdraw the regulations. Third, the President's regulatory authority was to terminate altogether, and the petroleum regulatory program was to come to an end, on September 30, 1981.[8] Through that carefully formulated scheme,

[7] The other titles of the Act include provisions to stimulate domestic production of coal and other fuels (42 U.S.C. §§ 6211-15), to establish the Strategic Petroleum Reserve (42 U.S.C. §§ 6231-46), to set up emergency conservation and rationing contingency plans (42 U.S.C. §§ 6262-63), to prescribe energy efficiency standards for automobiles, consumer products, and industrial equipment (15 U.S.C. §§ 2001-12; 42 U.S.C. §§ 6291-6317), to foster federal, state, and industrial non-emergency conservation programs (42 U.S.C. §§ 6321-63), and to authorize participation in international energy allocation and conservation plans (42 U.S.C. §§ 6271-75).

[8] In its entirety, section 461 of the EPCA, 89 Stat. 955, provides:

> The Emergency Petroleum Allocation Act of 1973 is amended by adding to the end of such Act, as amended by this Act, the following new section:
>
> "SEC. 18. Notwithstanding any other provisions of this Act, at midnight on the conclusion of the 40th month in which the amendment under section 8(a) is in effect, the President's authority to promulgate, make effective, and amend a regulation pursuant to section 4(a) of this Act shall become discretionary rather than mandatory, and the limitations on the President's authority contained in sections 4(b)(2), (8), and (9) of this Act shall terminate. The authority to promulgate and amend any regulation or to issue any order under this Act shall expire at midnight September 30, 1981, but such expiration shall not affect any action or pending proceedings, administrative, civil, or criminal, not finally determined on such date, nor any administrative, civil, or criminal action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration date."

Congress sought to move in measured steps from mandatory controls to discretionary regulation and ultimately to exclusive reliance on market forces to govern petroleum prices.

As petitioners correctly acknowledge (Pet. Br. 13), state regulation of petroleum prices was preempted throughout the decontrol transition period, even with respect to products that had been exempted from federal regulation, and even after President Reagan exempted all products from controls in January 1981. *Mobil Oil Corp. v. Tully*, 653 F.2d 497 (TECA 1981), *vacated and remanded*, 455 U.S. 245 (1982); *Mobil Oil Corp. v. Dubno*, 492 F. Supp. 1004 (D. Conn. 1980), *aff'd in part, dismissed in part*, 639 F.2d 919 (2d Cir.), *cert. denied*, 452 U.S. 967 (1981). According to petitioners' theory, however, Congress intended, at the moment the six-year transition to deregulation was completed, abruptly to relinquish to the states the power to reimpose whatever different and potentially conflicting versions of price controls they might choose to adopt.

To impute such an incongruous purpose to Congress is to presume that its painstaking effort to prepare the Nation's economy so gradually for life without regulation was utterly pointless. As TECA concluded, "[i]t is inconceivable" that Congress, in orchestrating this measured approach to deregulation, would have countenanced the prospect, once the goal was reached, "of over 50 individual regulatory schemes operating in the petroleum products markets." Pet. App. 13a.

2. *The EPCA's Legislative History Reveals a Long-Range Congressional Purpose to Achieve Unregulated Petroleum Markets*

The 1973 Arab oil embargo resulted in severe petroleum shortages and market dislocations. In light of the "emergency situation confronting [the] nation," Congress enacted the EPAA and gave the President broad mandatory authority to regulate the price and allocation of petroleum and petroleum products. H.R. Rep. No. 531, 93d Cong., 1st Sess. 6 (1973). The legislation was a temporary measure to provide stop-gap relief during the emergency. When it enacted the EPAA, Congress acknowledged that the Nation's energy problem "awaits a more far reaching and long ranged solution." H.R. Conf. Rep. No. 628, 93d Cong., 1st Sess. 14 (1973).

In the final days of 1975, after almost a year of extensive (and at times contentious) debate, the President and the Congress hammered out that "more far reaching and long ranged solution" in the EPCA. The Act represented a hard-fought political compromise between a President who vigorously advocated the swift removal of price controls and a Congress that feared the inflationary pressures and economic dislocations likely to result from rapid decontrol. In the end, the President acceded to Congress's insistence that the transition to free-market pricing be gradual, and Congress yielded to the President's demand for total deregulation of petroleum markets.

The political debate that culminated in the EPCA compromise is richly textured. Initial battle lines were drawn in early 1975, when President Ford, in his State of the Union Message, announced an urgent plan to achieve national energy independence. 11 Weekly Comp. Pres. Doc. 45 (Jan. 15, 1975). His proposal sought to "end vulnerability to economic disruption by foreign suppliers by 1985" and to increase substantially the Nation's energy production "by the end of this century." *Id.* at 49. The heart of the plan—and its most controversial aspect—was the President's intention immediately to

"decontrol the price of domestic crude oil" as a step toward "reducing our consumption of energy and increasing our production." *Id.* at 48-49.

In his Annual Economic Report to Congress, President Ford explained that the days of "[c]heap energy" were an "era [that] has now come to an end." 11 Weekly Comp. Pres. Doc. 143, 144 (Feb. 4, 1975). He warned that the "economy [must] adjust its consumption of energy to the new realities of the market place during the last part of the twentieth century." *Id.* at 145. Price controls had "slowed" that "adjustment" by sending the wrong signals to consumers and producers. *Id.* "[A]rtificially low [crude oil] prices [had] encourage[d] the wasteful use of energy and inhibit[ed] future [domestic] production." *Id.* The net result was greater reliance on imported oil, leaving the Nation increasingly vulnerable to catastrophic supply disruptions. The "only practical and effective way to achieve energy independence," the President argued, was to remove controls so that the "price mechanism" could operate freely in the marketplace. *Id.* That would permit "prices of oil and gas to move higher—high enough to discourage consumption and encourage the exploration and development of new energy sources." *Id.*

The reaction in Congress to the President's program was mixed, the controversy centering on his plan for immediate price decontrol. 121 Cong. Rec. at 40,715 (statement of Rep. MacDonald); *id.* at 41,182 (statement of Sen. Humphrey). Some in Congress firmly supported the President's "decontrol" strategy of "let[ting] the free market work." *Id.* at 23,976 (statement of Rep. Martin).[9] Others feared that decontrol "would touch off a new burst of inflation," "would be extremely disruptive to our economy," and would perhaps derail its emerging

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[9] *See, e.g.*, 121 Cong. Rec. at 9,364 (statement of Sen. Gravel); *id.* at 23,976 (statement of Rep. Martin); *id.* at 24,378 (statement of Rep. Jones); *id.* at 40,718 (statement of Rep. McCollister); *id.* at 40,724 (statement of Rep. Ketchum).

recovery from recession. *Id.* at 6,528 (statement of Sen. Tunney).[10]

Even those who opposed President Ford's proposal accepted his "underlying thesis" that "the market mechanism constitutes the most efficient and equitable allocator of resources." H.R. Rep. No. 340, 94th Cong., 1st Sess. 4 (1975). They believed, however, that "a gradual return to an unregulated market [would be] preferable to sudden decontrol," because that approach would "minimize[] the dislocations and impacts of any transition." *Id.* at 55, 58.

In the spring of 1975, sensing Congress's resistance to "immediate decontrol" and expressing a willingness to "compromise," President Ford proposed "to steadily phase out price controls on old oil over two years." 11 Weekly Comp. Pres. Doc. 467, 468 (April 30, 1975); *see* 40 Fed. Reg. 19,219 (May 2, 1975). With that offer of compromise, the President shifted the focus of the political debate to the length of time that would be necessary for making a smooth transition to deregulation. After considerable deliberation, the House in early July rejected the President's proposal on the ground that his decontrol schedule failed to provide sufficient "time for adjustment" and thus "charted a course which ask[ed] of the economy more than it [could] give in the time allotted." H.R. Rep. No. 340, *supra*, at 5, 9. The House believed that it would take at least five years to phase out controls to avoid injury to the economy. *Id.* at 9.

In mid-July, Congress passed the Petroleum Pricing Review Act, which would have broadened petroleum regulation in several respects. H.R. 4035, 94th Cong., 1st Sess. (1975).[11] The President quickly vetoed the bill.

[10] *See, e.g.*, 121 Cong. Rec. at 6,298 (statement of Sen. Jackson); *id.* at 22,740 (statement of Rep. Staggers); *id.* at 26,242 (statement of Rep. Annunzio).

[11] The bill included provisions that would have intensified "Congressional review of Presidential proposals to exempt petroleum products from the allocation or pricing controls currently in effect under the [EPAA]," imposed price controls on certain "classifications of domestic crude oil" not then regulated, and "extended" the EPAA "an additional 4 months from August 31 to December 31, 1975." H.R. Conf. Rep. No. 356, 94th Cong., 1st Sess. 7, 8 (1975).

121 Cong. Rec. 23,959-60. He also advanced a new compromise proposal that would have phased out controls over 30 months. 40 Fed. Reg. 30,030 (July 16, 1975). The House vetoed the proposal. 121 Cong. Rec. 23,960, 23,983-84. The President responded with yet another proposal—this one phasing out controls over 39 months. 40 Fed. Reg. 31,741 (July 29, 1975). It, too, was vetoed by the House. 121 Cong. Rec. 25,870-71, 25,881-82.

Thus, by summer's end, the President and Congress had reached a "stalemate." 121 Cong. Rec. at 41,059 (statement of Sen. Moss). A turn of events in September, however, set the stage for the EPCA compromise. Early that month, Congress passed legislation extending, for another six months, the EPAA's price and allocation authorities, which had expired on August 31. S. 1849, 94th Cong., 1st Sess. (1975). President Ford vetoed the extension legislation. President's Remarks Upon Vetoing S. 1849, 11 Weekly Comp. Pres. Doc. 974 (Sept. 9, 1975). The President believed that, if the issue were put off, Congress would be unable "to face up," during the upcoming election year, to "the very difficult problem" of devising "a comprehensive national energy program for future independence from foreign suppliers." *Id.* at 974, 975.

At the same time, however, the President left the door open to further discussion. He preferred to move "from government controls to the free market," not simply through an expiration of the EPAA, but rather through the enactment of affirmative legislation establishing a sound national energy policy, the "essential first step" of which was "[r]esolution of the oil price controls issue." *Id.* at 975, 976. The President therefore promised: "If my veto is sustained, I still will accept a 45-day extension of price controls to provide time to work

with the Congressional leaders who have assured me that they will seek an acceptable compromise during this period." *Id.* at 976.

The Senate narrowly sustained the President's veto (121 Cong. Rec. at 28,490), and Congress promptly responded to his offer to work out a compromise. In late September, Congress passed, and the President signed, a "limited extension of the [EPAA] to provide . . . adequate time and opportunity to reach mutual agreement on a long-term petroleum pricing policy." Emergency Petroleum Allocation Act of 1975, § 4, Pub. L. No. 94-99, 89 Stat. 481.[12]

A conference committee that had been convened to consider energy bills previously passed by the House and the Senate provided the vehicle for ironing out the remaining differences between the President and the Congress. The conference committee met throughout the fall, with the President enjoying an almost unprecedented degree of participation in its deliberations. The "conferees were in constant touch with administration officials whose views were taken into account" and "formed an integral part of the final product." 121 Cong. Rec. at 41,040 (statement of Sen. Hartke). *See id.* at 40,724 (statement of Rep. Eckhardt); *id.* at 40,725 (statement of Rep. Rogers).

In December 1975, agreement was reached, and the committee reported out S. 622—the EPCA compromise. *Id.* at 39,281. "All of the provisions of the bill, especially the oil pricing section, were worked out with the full knowledge and in many cases the demand of the administration." *Id.* at 40,716 (statement of Rep. MacDonald). The legislation was intended to "establish[] a comprehensive national energy policy" having the "long run" goals of "decreas[ing] dependence upon foreign imports,

[12] The legislation postponed the expiration date to November 15. That date was later extended for a month to December 15. Emergency Petroleum Allocation Act—Extension, Pub. L. No. 94-133, 89 Stat. 694 (1975).

enhanc[ing] national security, achiev[ing] the efficient utilization of scarce resources, and guarantee[ing] the availability of domestic energy supplies at prices consumers can afford." S. Conf. Rep. No. 516, 94th Cong., 1st Sess. 116, 117 (1975). The fundamental mechanism for achieving those goals was the legislation's effectuation of "a gradual return to an unregulated market." *Id.* at 203.

The EPCA's resolution of the decontrol debate was considered an epic compromise, "represent[ing] the best consensus possible to achieve a sensible and sound long-run energy program." 121 Cong. Rec. at 41,195 (statement of Sen. Kennedy).[13] Through the political give-and-take, each side got what it prized the most. For Congress, it was an extended timetable for implementing the EPCA's decontrol provisions. For the President, it was a definitive commitment to his ultimate objective—the total deregulation of petroleum markets. As the President explained in his signing statement, while the EPCA does not deregulate "as quickly as I would like," it does "remove[] controls," "over time," and "should give industry sufficient incentive to explore, develop, and produce." 11 Weekly Comp. Pres. Doc. 1392 (Dec. 22, 1975).

[13] Senator Humphrey described the road to the EPCA compromise this way: "After 10 long months, we have finally pieced together a national energy policy" that "will take us a long way toward energy independence." 121 Cong. Rec. at 41,182. "This policy," he continued, "is the fruit of a difficult process of compromise; a process characterized by bitter words between Congress and the President; and a process characterized repeatedly by both Presidential and congressional vetoes of energy proposals." *Id.* When the expiration of the EPAA price control authority became imminent, "Congress and President Ford were confronted with a difficult choice: They could continue the increasingly acrimonious and seemingly endless debate over decontrol; or they could compromise on the issue of oil prices and clear the way to establishment of a national energy policy." *Id.* at 41,183. In the end, "Congress was able to forestall the administration's decontrol scheme and the President was able to forestall a continuation of price controls. Compromise was necessary and compromise we did." *Id.* *See also* 121 Cong. Rec. at 41,143 (statement of Sen. Glenn); *id.* at 40,715 (statement of Rep. MacDonald); *id.* at 41,059 (statement of Sen. Moss); *id.* at 40,725 (statement of Rep. Rogers).

Those incentives—and thus the ultimate objective of the EPCA compromise—are tied inextricably to the operation of market forces unimpeded by government regulation. As one court accordingly concluded, "[t]he legislative history repeatedly confirms Congress' view that exemption from EPAA regulation represents an affirmative federal decision that petroleum product prices be set by the free market"—not by governmental controls. *Mobil Oil Corp. v. Dubno*, 492 F. Supp. at 1012.[14]

3. *Federal Deregulation Was Not a Decision Merely to End Federal Controls and Restore the Pre-1973 Status Quo*

Petitioners seek to evade the force of the EPCA legislative record in two ways.

First, they argue that the legislative history says nothing about "state regulation or the preemption thereof" and thus reflects no more than a Congressional purpose to remove *federal* controls. Pet. Br. 13, 25-26. But, as we have shown, the proper inquiry is not whether Congress specifically intended to foreclose state controls but whether the Congressional purpose in removing federal controls would be frustrated by state regulation. Here, that purpose is clear. Congress decided that the best long-run approach to achieve the national security goal of energy independence was to let market forces, not regulation, govern petroleum prices. The imposition of

[14] In 1979, Congress revisited and confirmed the EPCA decontrol compromise. A floor amendment to the DOE fiscal year 1980 authorization bill would have reimposed mandatory controls by depriving the President of the power to deregulate. Proponents characterized the issue as a "vote on decontrol"; they argued that "recontrols" would provide "some protection to stem the tide of inflation." 125 Cong. Rec. 27,903 (1979) (statement of Rep. Moffett). Opponents, by contrast, viewed the issue as an "opportunity, through confirming the current policy on decontrol," "to send a signal" that Congress was "serious" about "an energy policy." *Id.* at 27,908 (statement of Rep. Wirth). They argued that "[d]econtrol must be the base of a future national energy policy for this country." *Id.* The amendment's defeat was a reaffirmation of that policy. *Id.* at 27,927-28.

state price controls, no less than the perpetuation of federal controls, would utterly frustrate that purpose. To suggest, as petitioners do, that the Congressional goals could be satisfied simply by ending federal regulation and converting to a local option plan, under which all 50 states would be free to adopt whatever potentially conflicting price control schemes they wish, reflects a gross misreading of the legislative history.

As in *Transco*, "Congress clearly intended to eliminate the distortive effects" of federal price regulation. 474 U.S. at 424 n.6. "To suggest that Congress was willing to replace this distortion with a distortion on price caused by" state regulation "requires taking an artificially formalistic view of what Congress sought to achieve." *Id.*

Second, petitioners parse the EPCA conference report in an effort to prove that Congress did not intend to preempt "beyond the period of the standby authority," after which there would be a "reversion to the market as it existed prior to the enactment of the EPAA, when the states indisputably possessed the power to regulate the industry at the local level." Pet. Br. 27. In support of that thesis, petitioners seize on a single word in the conference committee's statement that it intended to achieve "a gradual return to an unregulated market." Its use of the word "return," petitioners argue, must mean that Congress contemplated merely a "return" to pre-1973 conditions. Pet. Br. 26-27.

Against the background of the full legislative history, however, it is evident that the committee's shorthand expression was meant to convey its intention to move from price controls to a free market, not merely to restore the pre-1973 *status quo*. Both Congress and the President recognized in 1975 that the world had changed permanently and that new, long-term solutions to the Nation's energy problems were required. The legislative record is replete with statements that the EPCA represented the Congress's and the President's efforts to devise a "long-term petroleum pricing policy" to deal with the "new

realities" of the post-embargo energy world. *See, e.g.*, EPAA of 1975, § 4, 89 Stat. 481; 1975 Economic Report to Congress, 11 Weekly Comp. Pres. Doc. at 144, 145; H.R. Rep. 340, *supra*, at 1. With that "new era," Congress noted, came "the need for policy decisions at the national level." *Id.*

The entire thrust of the EPCA is thus incompatible with petitioners' notion that Congress intended to end federal involvement in energy policy and to decentralize petroleum regulation. As one court correctly concluded, "[t]he recognition on the part of Congress that the United States was entering a new era . . . which necessitated a national energy policy belies [the] argument that the 1975 amendment . . . signaled a return to the *status quo ante*, allowing states to regulate freely with regard to petroleum products." *Mobil Oil Corp. v. Tully*, 499 F. Supp. 888, 909 (N.D.N.Y. 1980), *aff'd*, 653 F.2d 497 (TECA 1981), *vacated and remanded*, 455 U.S. 245 (1982).

4. *The Congressional Purpose Cannot Be Disregarded on the Theory That It Is Not Embodied in an "Extant" Statute*

The Solicitor General argues that "the deregulatory sentiment that inspired" the EPCA should be accorded no preemptive effect because, in his view, it is not embodied in "any particular extant provision of federal law." US Br. 13. But the EPCA is unquestionably an "extant" federal law whose ongoing programs and policies remain vital to the Nation's energy security. The centerpiece of the EPCA's scheme, today no less than when it was adopted in 1975, is the continuation after September 1981 of unregulated petroleum markets free of all government control.

The Solicitor General acknowledges that the currently effective provisions of the EPCA "frame a national energy policy." US Br. 20 n.9. But he disqualifies those provisions on the theory that they cannot properly embody the deregulatory intent of Congress. In his view,

only Title IV of the Act, which specifically amended the EPAA to extinguish federal regulatory authority, can serve as the vessel for any free-market purpose behind the EPCA. The Solicitor General then examines Title IV —or, more precisely, the EPAA after amendment by Title IV—and finds that its regulatory provisions are no longer effective, decontrol having been accomplished in September 1981. He concedes that one provision—section 18 of the EPAA, added by section 461 of the EPCA—"could be said to be now in force." US Br. 13. But he discounts the preemptive effect of that provision as well, because "it is not what the EPAA was before the President's regulatory authority expired: a substantive federal regulatory program." US Br. 14. The Solicitor General thus perversely concludes that the EPAA's regulatory provisions are the only ones that could both embody the EPCA's free-market purpose and also have preemptive force, that those provisions are no longer "extant" because the regulatory program has been dismantled, and that the deregulatory legislative policy of the EPCA must therefore be disregarded because it is now "unembodied in any statute" that is both extant and preemptive. US Br. 13.

The argument makes little sense. To deny preemptive effect to a deregulatory statute on the ground that it has achieved its purpose—thereby rendering non-"extant" the only provisions that can properly "embody" the deregulatory purpose—is to create a classic Catch-22, the effect of which is to defeat rather than promote Congressional intent. The facts are that Congress in the EPCA enacted a comprehensive statute embodying a national energy policy, that part of that statute substantially amended the EPAA to provide for gradual decontrol leading to complete petroleum deregulation, and that both the statute and the underlying deregulatory policy remain vital and controlling. That Congress implemented its policy by extinguishing the President's regulatory authority under the EPAA does not mean, as the Solicitor General would have it, that the policy thereupon self-destructed, transforming itself into an ethereal "deregulatory sentiment"

(US Br. 13) impotent to prevent state incursions upon the federal legislative design.

The situation here is no different in principle from that in *Transco*. There, as here, Congress enacted a comprehensive energy statute built in large measure on principles of free-market pricing. Section 601 of the NGPA, 15 U.S.C. § 3431, provided, in language comparable to section 461 of the EPCA, that in November 1978 federal jurisdiction to regulate wellhead sales of certain categories of natural gas would terminate. Section 601, like section 461, neither expressly preempted state regulation nor created a new regulatory program. Nor was section 601 any more integral to the NGPA's scheme than section 461 was to the EPCA's scheme. Just as the free-market purpose in the NGPA retained its preemptive force after wellhead deregulation was accomplished, so too the free-market purpose in the EPCA retains its preemptive force after petroleum price deregulation was accomplished.

5. *Post-EPAA Events Did Not Alter the 1975 Congressional Purpose*

Petitioners proffer a collection of post-decontrol utterances in an effort to prove that Congress "did not view state law as preempted after federal regulatory authority lapsed." Pet. Br. 13. The argument fails for three reasons.

First, it disregards this Court's "oft-repeated warning that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980), *quoting United States v. Price*, 361 U.S. 304, 313 (1960). *Post hoc* legislative history "does not bear strong indicia of reliability . . . because as time passes memories fade and a person's perception of his earlier intention may change." *GTE Sylvania*, 447 U.S. at 118 n.13. Consequently, even a "statement in a conference report . . . as to what the Committee believes an earlier statute meant" carries little weight. *Id.* The

rule applies with even greater force where, as here, the subsequent statements "do not even refer to" the prior legislation or its underlying purposes. *South Carolina v. Regan*, 465 U.S. 367, 379 n.17 (1984).

Second, petitioners ask the wrong question. Their mission, as they conceive it, is to "cast[] . . . doubt on whether Congress has ever had the requisite 'clear and manifest' congressional intent to preempt state law." Pet. Br. 34. They accordingly seize upon statements suggesting that some members of Congress may have believed, six or more years after enactment of the EPCA, that new legislation was needed to bar the states from stepping in to regulate petroleum prices, and they infer unjustifiably that those members must have thought that Congress as a whole did not have the requisite preemptive intent in 1975.

But the real issue is not whether Congress had a conscious intention in 1975 to preempt state law after 1981. It is whether Congress in 1975 intended market forces to operate freely after 1981. Nothing that petitioners cite from the post-EPAA period casts any doubt at all on the overarching free-market purpose of the EPCA. On the contrary, as TECA correctly concluded, "on this issue of national importance, Congress's initial intent to deregulate the petroleum products market remained in place." Pet. App. 17a. Indeed, the comments on which petitioners rely reveal widespread Congressional concern that the free-market objectives of the EPCA would be defeated if states could impose price and allocation regulations. Thus, as TECA observed, "[t]he post-expiration actions reinforce [the] conclusion that by phasing out federal authority to regulate the petroleum products markets Congress intended [in 1975] to establish markets free of any government interference." *Id.*

Third, it is hardly surprising that there was confusion, or even substantial doubt, concerning the legal effect of federal deregulation. In the *Tully* litigation, discussed later in this brief, TECA had stated in dicta that the

termination of EPAA regulatory authority in September 1981 would "signal the end of federal concern." *Mobil Oil Corp. v. Tully*, 653 F.2d 497, 502 (TECA 1981). This Court repeated the statement when it vacated TECA's judgment. *Tully v. Mobil Oil Corp.*, 455 U.S. 245, 246, 247 (1982). Although neither this Court nor TECA had considered the 1975 legislative purpose or its implications for the period after 1981, members of Congress, as TECA noted in the present case, might well have been "unsure about post-expiration preemption as a result of ongoing litigation in *Mobil Oil Corp. v. Tully* and wanted to reaffirm [the] position that allocations and price controls are a matter of federal concern." Pet. App. 15a. The introduction of bills designed to overcome the apparent implications of the *Tully* litigation "hardly suggests that their sponsors viewed those decisions as correct interpretations" of the 1975 legislative purpose. *Russello v. United States*, 464 U.S. 16, 26 (1983).

C. The Puerto Rico Regulation Displaces Market Forces and Stands as an Obstacle to the Full Accomplishment of the EPCA's Objectives

The DACO orders in this case directly regulate the price at which refiners, wholesalers, and retailers may sell gasoline on the island. Consequently, the issue that divided the Court in *Transco*—whether Mississippi's ratable-take order "distort[ed] the market," as the majority concluded (474 U.S. at 424), or "promote[d] the efficient operation of the market," as the dissenting Justices believed (*id.* at 434)—is not present in this case. No party here even suggests that Puerto Rico's invasive regulation does anything other than displace market forces—that is precisely its purpose. It thus "inevitably frustrates" (*Jones v. Rath Packing Co.*, 430 U.S. at 545 (Rehnquist, J., dissenting)) the policy of the EPCA to rely solely on market forces to determine the price of petroleum products.[15]

[15] In response to a recent Congressional inquiry about this litigation, the Acting General Counsel of the Department of Energy, while acknowledging that the Solicitor General speaks authoritatively for the United States on the legal issues addressed in his brief, expressed the Department's policy view that "[t]he imposition of price and allocation controls on gasoline by a number of states could generate enormous inefficiencies by interfering with market signals and could lead to severe dislocations." Letter from Eric J. Fygi, Acting General Counsel, Department of Energy, to Senator Don Nickles (Dec. 31, 1987), copies of which have been lodged with the Clerk and served on the parties. The letter further states that "[a]ccordingly, . . . the Department would view with grave concern any trend by the states to impose such controls on gasoline sales and consumption." *Id.* Underlying that concern is the same judgment that Congress made in enacting the EPCA. As the DOE letter puts it, "petroleum price regulation would discourage domestic crude oil production, frustrate accurate pricing signals being received in the marketplace, and thereby increase both net petroleum product consumption and necessarily this nation's reliance on petroleum imports." *Id.*

There is no merit to petitioners' argument that Puerto Rico should nonetheless be free to regulate gasoline prices because its petroleum market is not as competitive as those "in the continental United States" and "does not always respond to market signals in the same way as a more competitive market." Pet. Br. 15, 47. The competitiveness of the Puerto Rico market was placed in issue and litigated before the District Court. That Court specifically found, contrary to petitioners' assertion here, that "the refining and wholesale gasoline markets in Puerto Rico" were at all relevant times "highly competitive." Pet. Supp. App. SA37. Petitioners chose not to challenge that finding in the court below and should not be permitted to do so in this court. *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[16]

[16] In their Designation of Issues and Record, filed in July 1986 in accordance with TECA's Rules, petitioners stated that the "sole issue" presented by their appeal was the legal question whether the DACO orders were preempted. The only items they designated as the Record on Appeal consisted of Regulation No. 45 as amended, DACO's 1986 orders, and the District Court's Memorandum Opinion and Order. Petitioners specifically represented in their brief before TECA that "the facts relevant to [the preemption] issue are not in dispute." Brief for Appellants at 2.

Puerto Rico may well believe that it has "unique problems" (Pet. Br. 46) or that its "economy is significantly different from that of other jurisdictions." NGA Br. 8. Market conditions in every jurisdiction are, of course, in some sense unique. Congress, however, enacted a national energy policy based squarely on free-market petroleum pricing. Under the Supremacy Clause, that policy must be honored even if a state believes deeply that its special circumstances call for a different approach to the problem. "The relative importance to the State of its own law is not material where there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail." *Free v. Bland*, 369 U.S. 663, 666 (1962); *accord Fidelity Federal Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982).

Nor is there any basis for concern that TECA's holding sweeps too broadly. *See* Pet. Br. 46 n.44; NY Br. 2. TECA did not disturb the District Court's careful circumscription of its order. The only category of state law affected by the holding below is "governmental interference with the [petroleum] pricing system." Pet. Supp. App. SA85. The Court specifically excluded from the preemptive scope of its order state laws (1) that permit responses to energy emergencies or major petroleum supply disruptions,[17] (2) that promote energy conservation or restrain consumer demand for petroleum products, or

[17] Petitioners believe that the exception for energy emergencies "turns logic and public policy on its head." Pet. Br. 36. In the face of a genuine emergency, however, there may well be reason, at least pending a response at the national level, to permit state authorities to deal with local problems in a way that best serves the immediate public interest. By contrast, in non-emergency circumstances—such as those presented here—a state's interference in the marketplace collides with the federal policy of deregulation, risks disrupting the nationwide operation of the free market, and consequently jeopardizes the Nation's energy security. In any event, since this case does not involve an energy emergency, the Court need not resolve whether state regulation in such a situation would defeat the 1975 Congressional objectives.

(3) that serve "regulatory goals unrelated to emergency preparedness, including consumer education and fair trade supervision." *Id.* State antitrust regulation and taxing powers likewise "are not to be affected." *Id.* at SA86.

While any conflict preemption case leaves open the possibility that state laws slightly different from the one at issue might also be invalidated, this case hardly has the boundless implications that petitioners impute to it. On the contrary, preemption here is far more precisely cabined than it was in *Transco*, and Puerto Rico's price regulation, unlike Mississippi's ratable-take order, is the paradigm of market interference.

II. TULLY DOES NOT FORECLOSE PREEMPTION

Contrary to petitioners' argument (Pet. Br. 37-40), this Court's decision in *Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982), is not a barrier to preemption in this case.

The issue in that litigation—which concerned the period *prior* to September 1981—was whether federal law preempted a New York regulation prohibiting oil companies from passing through to their customers the cost of a state gross-receipts tax. TECA ruled that the anti-passthrough regulation was "an instrument of price control and in conflict with the objectives of the program." 653 F.2d at 502. It accordingly affirmed an order of the District Court permanently enjoining enforcement of the regulation. *See* 499 F. Supp. at 891. TECA added, in an aside: "When the statute expires in September 1981, it will signal the end of federal concern in this area." 653 F.2d at 502. The validity of the New York law after September 1981, however, was not before the court and was neither briefed nor argued by the parties. As TECA accordingly recognized in the present case, its statement in *Tully* constituted "dicta." Pet. App. 15a n.8.

On appeal—the federal regulatory authority having terminated in the meantime—this Court concluded, act-

ing summarily, that "the judgment and injunction are not appropriately framed for this Court to review." 455 U.S. at 248. The problem was that the injunction continued beyond the date that TECA's opinion appeared to justify. "[T]he injunction entered by the District Court and affirmed by TECA did not terminate on October 1, 1981, the date that TECA acknowledged to signal the end of federal concern in the area." *Id.* at 247. Having identified the discrepancy, the Court determined that TECA itself should resolve it in the first instance. The Court therefore vacated the judgment and remanded to TECA "for reconsideration in light of the expiration of federal price control authority under the EPAA." *Id.* at 249.

Several passages of this Court's opinion assume, as TECA's opinion itself had assumed, that federal law would not preempt New York's regulation after termination of the federal regulatory program. The Solicitor General believes that those statements were "necessary to the Court's disposition" (US Br. 14 n.4); petitioners likewise assert that "the issue [of post-1981 preemption] was decided on the merits." Pet. Br. 40.

Although the opinion can be read that way, we doubt that the Court would have intended in its summary disposition to rule definitively on an issue of some subtlety that no party thought was before the Court. As the Solicitor General acknowledges, "the case had not been briefed on the merits and the effect of the expiration of federal regulatory authority does not appear to have been raised explicitly by the parties." US Br. 14-15 n.4. The Court's opinion, moreover, addressed neither the federal policy underlying the 1975 legislative compromise nor the impact of that policy on post-1981 preemption.[18]

[18] Petitioners themselves point out (Pet. Br. 39) that the issue was not briefed before this Court, even after the Clerk requested the parties' views on whether expiration of the federal program mooted the case. But that does not support petitioners' inference (Pet. Br. 40) that no party thought there could be post-1981 preemption. On the contrary, all it shows is that no party thought that the post-1981 issue had yet been presented.

On remand to TECA, the oil companies made clear that, in their view, "the federal interest in unregulated petroleum product prices continues beyond October 1, 1981 and that the preemption of the antipassthrough provision did not end on September 30, 1981." Memorandum for Plaintiffs-Appellees at 9, *Mobil Oil Corp. v. Tully*, 689 F.2d 186 (TECA 1982). They explained, however, that the issue had "not [been] presented by the State's appeal [to the Supreme Court] and is not now before [TECA]." *Id.* at 12. They expressed their intention at a later date "to raise before the district court the issue of post-September 1981 preemption." *Id.* at 13.

After TECA remanded the case to the District Court (689 F.2d at 187), the companies moved for summary judgment with respect to the post-1981 period and presented in full their argument that "there is still an affirmative federal energy policy of decontrol of petroleum product pricing with which the anti-passthrough provision continues to conflict." Memorandum for Plaintiffs at 13-14, *Mobil Oil Corp. v. Tully*, No. 80-CV-543 (N.D.N.Y.). The case ultimately was settled before the District Court resolved the issue.

It has long been the rule that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925). *Accord Western & Southern Life Ins. Co. v. State Board of Equalization*, 451 U.S. 648, 656 n.8 (1981); *Adams v. Texas*, 448 U.S. 38, 45 n.3 (1980). In a case strikingly similar to this one, the Court refused to give controlling effect to one of its own prior decisions because no party there had "brought to the Court's attention" a Congressional "change of policy" that was crucial to a correct understanding of the legislative purpose. *Great Northern Ry. v. United States*, 315 U.S. 262, 279 (1942).

As in *Great Northern*, no party in *Tully* brought to this Court's attention the Congressional policy in the EPCA that the Nation's energy security required reliance on market forces alone to determine the price of petroleum products after 1981. Regardless of whether the Court's statements concerning post-1981 preemption were "necessary" to its disposition in *Tully*, petitioners' effort

to ascribe preclusive force to those statements goes too far. Particularly in light of this Court's subsequent decision in *Transco*, *Tully* should not be read to foreclose consideration here of a controlling issue of legislative intent that was never raised in that case.

To say that the issue remains open does not imply, as petitioners and their amici contend (Pet. Br. 41-46; NGA Br. 17-19), that *Transco* "overruled" *Tully*. Rather, *Transco* confirmed that the pivotal question in this case is whether Congress intended in 1975 to leave petroleum markets unregulated after federal decontrol. This Court did not address that issue in *Tully*. TECA correctly resolved it here.

CONCLUSION

The judgment of the Temporary Emergency Court of Appeals should be affirmed.

Respectfully submitted,

JAIME SIFRE-RODRIGUEZ
LUIS SANCHEZ-BETANCES
SANCHEZ-BETANCES & SIFRE
Banco Central Building
Suite 700
Hato Rey, Puerto Rico 00917-1866
(809) 756-7880

NOEL S. GONZALEZ-MIRANDA
MARIO L. PANIAGUA
SWEETING, GONZALEZ & CESTERO
Banco Central Building
Suite 400
Hato Rey, Puerto Rico 00917-1866
(809) 756-7150

DONALD B. CRAVEN *
MARK L. EVANS
JAMES P. TUITE
MILLER & CHEVALIER, Chartered
Metropolitan Square
655 Fifteenth Street, N.W.
Washington, D.C. 20005-5701
(202) 626-5800

Attorneys for Respondents Esso Standard Oil Co. (P.R.) and Caribbean Gulf Refining Corporation

* Counsel of Record

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RESPONDENT'S

BRIEF

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In The
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PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, et al.,

Petitioners,

v.

ISLA PETROLEUM CORPORATION, et al.,

Respondents.

On Writ of Certiorari To The
Temporary Emergency Court of Appeals

BRIEF FOR RESPONDENTS SHELL, MOBIL, PHILLIPS, TEXACO, ISLA, GASOLINAS AND CIA. PETROLERA

Igor Domínguez
WILLIAM ESTRELLA
LAW OFFICES
Counsel for Texaco
Puerto Rico, Inc.
P.O. Box S-4826
San Juan, Puerto Rico 00905
(809) 721-7481

Rafael Pérez-Bachs*
Néstor M. Méndez-Gómez
Ana Matilde Nin
Arturo J. García-Solá
McCONNELL VALDES KELLEY
SIFRE GRIGGS & RUIZ-SURIA
Counsel for The Shell Company
(Puerto Rico) Limited,
Mobil Oil Caribe, Inc., and
Phillips Puerto Rico Core, Inc.
G.P.O. Box 4225
San Juan, Puerto Rico 00936
(809) 759-9292

Alvaro R. Calderón, Jr.
Counsel for Isla Petroleum
Corp. and Gasolinas de
Puerto Rico Corp.
P.O. Box 2219
Hato Rey, Puerto Rico 00919
(809) 753-5050

Carlos F. López
Celso E. López
Counsel for Cía. Petrolera
Caribe, Inc.
P.O. Box 8852
Santurce, Puerto Rico 00910
(809) 721-5037

*Counsel of Record

PUBLISHING RESOURCES, INC. SAN JUAN, PUERTO RICO

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QUESTION PRESENTED FOR REVIEW

Whether a considered congressional decision to forgo regulation of petroleum product prices, as a matter of national policy, preempts Puerto Rico from regulating gasoline prices, because such regulation constitutes an obstacle to the accomplishment of the full purpose and objective of Congress of letting market forces set those prices free of any government interference.

LIST OF PARTIES

Petitioners

1. Department of Consumer Affairs of the Commonwealth of Puerto Rico

2. Pedro Ortiz Alvarez, Secretary of the Department of Consumer Affairs

Respondents*

1. The Shell Company (Puerto Rico) Limited

2. Mobil Oil Caribe, Inc.

3. Phillips Puerto Rico Core, Inc.

4. Caribbean Gulf Refining Corp.

5. Texaco Puerto Rico, Inc.

6. Esso Standard Oil Co. (P.R.)

7. Isla Petroleum Corp.

8. Gasolinas de Puerto Rico Corp.

9. Cía. Petrolera Caribe, Inc.**

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*Appearing respondents incorporate by reference their Rule 28.1 listing of April 10, 1987, except that, as to Phillips Puerto Rico Core, Inc., striking therefrom "Walton Insurance Limited" and adding "Spodco U.S.A., Inc." as affiliates or subsidiaries of Phillips Petroleum Company.

**Petitioners' claim at p. ii of their brief that respondent Cía. Petrolera Caribe "did not participate in the TECA proceeding" is inaccurate. See Joint Appendix, p. 5, docket entry "Sept. 2" (1986).

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On Writ of Certiorari To The
Temporary Emergency Court of Appeals

BRIEF FOR RESPONDENTS SHELL, MOBIL, PHILLIPS, TEXACO, ISLA, GASOLINAS AND CIA. PETROLERA

Respondents The Shell Company (Puerto Rico) Limited, Mobil Oil Caribe, Inc., Phillips Puerto Rico Core, Inc., Texaco Puerto Rico, Inc., Isla Petroleum Corp., Gasolinas de Puerto Rico Corp. and Cía. Petrolera Caribe, Inc.,[1] very respectfully submit this brief urging affirmance of a decision of the Temporary Emergency Court of Appeals enjoining petitioners from regulating gasoline prices in contradiction of national policy, thus frustrating the purposes of Congress.

[1]To refer to the record, the following abbreviations are used in this brief: "TECA" is the Temporary Emergency Court of Appeals. The "trial court" is the United States District Court for the District of Puerto Rico. The appendix to the petition for certiorari is "PA." The supplemental appendix to the petition for certiorari is "SA." The joint appendix is "JA." Petitioners Puerto Rico Department of Consumer Affairs and Pedro Ortiz Alvarez are "DACO" and "Ortiz Alvarez." Respondents are usually referred to as "wholesalers," "refiners" or by their corporate names, such as "Shell," "Phillips," etc.

STATEMENT OF THE CASE

This case involves a 1986 attempt by DACO to regulate gasoline prices in contradiction of national policy that such prices be regulated only by market forces.[2] It is indisputable that in the area of commerce Congress has the power to dictate policy choices for the Nation as a whole. Congress' short-term choice in 1973 was pervasive regulation of petroleum prices and allocations. Then, in 1975, Congress opted to gradually abandon that choice, establishing instead, as a new national policy, no government regulation, *i.e.*, regulation by the marketplace. Congress could have opted for the alternative of state regulation, but chose not to. Consistent with the new national energy policy, Puerto Rico, as any state, can exercise its police powers *only* to address the local impact of supply disruptions caused by a petroleum crisis. Because there was no such disruption during the relevant period, DACO's efforts here violate national policy and thus must be held to be preempted, as dictated by the Supremacy Clause of the Constitution, Art. VI, cl. 2.

The facts of this case are important to the resolution of the preemption question at issue herein only to the extent that they shed light on whether, during the relevant period, Puerto Rico experienced a situation calling for the exercise of its limited police powers to respond to a supply disruption. There was no such disruption. DACO's regulatory orders — whether legitimate, as DACO claims, or illegitimate, as the trial court found — had nothing to do with responding to any disruption.

In its statement of the case, DACO has sought to convey the impression that there existed in Puerto Rico a sense of urgency calling for the exercise of Puerto Rico's police powers. Despite this ingenious attempt, the fact remains that DACO does not claim — nor can it, since such was not the case — that there was any supply disruption or emergency situation in Puerto Rico, which could have legitimately triggered the exercise of DACO's limited regulatory powers.

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[2]The trial court also invalidated DACO's regulations on takings and due process grounds.

The facts controlling herein are those found by the trial court, which are in sharp contrast to those stated by DACO. SA 7-54. The true state of affairs in Puerto Rico at the beginning of 1986 was *not* one of emergency. The Puerto Rico government was not looking for ways to alleviate any alleged lack of competition in the gasoline industry or any shortage problem due to Puerto Rico's allegedly isolated location or lack of petroleum resources, or to prevent wholesalers from reaping excessive profits, since none of those conditions were present in Puerto Rico.

Rather, the government was simply looking for ways to raise revenues. It did so through the imposition of a new excise tax on petroleum products. Because of the public outcry generated by the new tax, the government promised the consumers that they would not bear the impact of the tax. The idea was to have the wholesalers totally absorb the excise tax. However, under the statute administered by DACO, 23 L.P.R.A. § 734, DACO could not forbid the wholesalers from passing through excise taxes. Thus, to fulfil the promise to the consumers, DACO attributed excessive profits to the wholesalers, without any objective data, and prohibited them from passing through the tax as a way to "compensate" for their allegedly "excessive" profits. This coincided with higher gasoline prices worldwide. Since any increase in the price of gasoline at the pump would be attributed by consumers to the new tax, DACO froze prices so that not even the higher acquisition costs could be passed through, thereby causing huge losses to the wholesalers and prompting the filing of this action.

Because of DACO's one-sided presentation of the facts, a more accurate statement, amply supported by references to the trial court record, is necessary.

Regulation and Competition in the Puerto Rico Gasoline Market

In 1976, DACO issued Regulation No. 45, Amendment 1 ("Reg. 45"), with the alleged purpose of regulating prices of certain petroleum products, including gasoline. Its Art. 4 set forth specific criteria for DACO to fix prices or maximum profit margins, but did not fix any such price or margin. PA 37a-38a; SA 12-13, 14.

Between 1976 and 1981, DACO concedes Reg. 45 was preempted.

DACO Br. 5, and thereafter it was not implemented. As to Art. 4, prior to May 20, 1986, DACO never entered any order fixing prices or maximum profit margins pursuant thereto, SA 14, 15, 16, 22; JA 84-85; and DACO's May 20, 1986 price regulation (JA 21-29) did not follow the criteria set forth in said Art. 4. SA 36, 50.

Between 1981 and 1986, DACO's role was simply that of a watchdog monitoring a *de facto* deregulated free-competition market. SA 25 n. 9, 34-35; JA 84, 91.

DACO claims regulation was needed in Puerto Rico due to an alleged "high degree of concentration of its petroleum industry at the refining and wholesale distribution levels" and an alleged absence of "real competition." DACO Br. 4.[3] DACO, however, did not seem to recognize this need. At least through 1985 "there was no need to regulate prices." JA 89. The real reason for DACO's 1986 regulations had nothing to do with addressing high concentrations or absence of competition in the Puerto Rico market. *See infra* 3-5.

Between January 28, 1981 and April 23, 1986, DACO did not enter any formal order adopting any particular maximum price or profit margin, either based on the previous federal margins or its own. During this period the industry was a free-competing market; it did not go overboard in price setting, and DACO did not exercise its alleged power to regulate. SA 16.[4]

On March 18, 1986, Puerto Rico enacted Law No. 5 ("Law No. 5"), imposing an additional excise tax on gasoline. The old excise tax amounted to some 16¢/gallon of gasoline, which was always passed on to retailers. As of May 1986, the new tax added 14.29¢/gallon, for a total of 30.29¢/gallon. SA 5 n. 3, 39, 51. Because it

[3]Even assuming a 1978 legislative finding of absence of "real competition," Puerto Rico's Law No. 73 of June 23, 1978, 23 L.P.R.A. 1131-1135, seems to have worked very well, because by 1986 the trial court found the gasoline market in Puerto Rico to be fiercely and highly competitive. SA 27 n. 10, 37, 50, to which market the smaller wholesalers had added a dose of healthy competition. SA 38, a fact which DACO stipulated. JA 16, 17.

[4]Ortiz Alvarez claimed at trial that profit margins had been frozen in Puerto Rico since 1981, when no such prior margin orders even existed. SA 35. He contradicted himself when he admitted that it was not until May 20, 1986 that DACO "finally" established a specific profit margin. JA 56.

would incense the average consumer, the local government found this increase at the pump unpalatable. SA 22-25.

The alleged purpose of this new excise tax was "[t]o operate in conjunction with DACO's price controls to prevent wholesalers from retaining additional profits by not passing on price reductions to their retailer-customers" because DACO had "[c]ollected information that wholesalers were not passing on the full amount of ... price decreases [in world oil prices] to their retail station customers." DACO Br. 6; Nat. Br. 4, 17. The argument is fallacious on both counts. *First*, Puerto Rico has no oil production. DACO Br. 4 n. 2. None of the appearing respondents import crude oil, and thus they had to wait for price reductions to filter down the production and refining levels. This could not happen overnight and to the penny. SA 25 n. 9. *Second*, the trial court found exactly to the contrary: for the first quarter of 1986, wholesalers did not reap "excessive" profits. Instead, wholesalers and Phillips passed on to their customers their savings in acquisition costs.[5]

The day before the new excise tax was enacted, the government

[5]As to respondent CARECO, when DACO issued its April 23 and May 20, 1986 orders, it did not have any information concerning CARECO's profits for the first quarter of 1986. SA 53. As to Shell and Mobil, all DACO had were mere estimates. JA 82. Tenoco and Coquí did not increase their profit margins during the first quarter of 1986, and DACO so admitted. SA 26. DACO acknowledged they never had unreasonable or excessive profits in the first quarter of 1986. SA 38. They, *as well as other wholesalers*, reduced their prices as a result of the decrease in crude oil prices during the first quarter of 1986, thereby transferring to the retailers those savings resulting from the reduction in their purchase prices, SA 38, a fact which DACO stipulated. JA 18. Shell and Mobil passed through decreases in their cost to retailers, lowering prices by 39¢/gallon by mid-March 1986; and, but for the imminence of the new excise tax, the decrease would have been 44¢. SA 43. DACO admitted to Shell that it "[h]ad passed on a very large amount to the consumer which was equivalent to the reduction almost penny by penny, if not slightly more than what the crude price had been reduced and the gasoline price had been reduced." JA 77. DACO stipulated with Phillips that between January 1981 and March 1986, Phillips had reduced its price for unleaded gasoline by 53.66% and by 50.03% for leaded gasoline; and that for the first quarter of 1986, Phillips' price reductions had been 28.11% and 26.03%, respectively. JA 20. In a gross downplay of the evidence, DACO conceded before the trial court that "wholesaler's (sic) prices declined somewhat more rapidly in late February and early March." JA 13.

announced, by paid advertisement, JA 30, that only the wholesalers would pay the new excise tax and that DACO would see to it that gasoline prices would not be increased. SA 23-25. DACO's factual and legal course of action after the passage of Law No. 5 was directed solely to keeping this promise made to voters. SA 92-93. It had been predetermined that consumers would not pay the tax. JA 38. The DACO orders that were to follow had no legitimate regulatory purpose: they simply responded to the government's public commitment of keeping the lid tight on the gasoline industry irrespective of consequences. SA 33.

Thus, on March 26, 1986, DACO issued an order whose obvious purpose was that, for at least 15 days, the new excise tax would not be paid by the consumer. PA 45a. Then, on April 23, 1986, DACO issued two orders, one to refiners and the other to wholesalers. The order addressed to refiners permitted them to pass through to wholesalers the new excise tax. JA 8; SA 25. The order addressed to wholesalers retroactively froze their prices at those effective on March 31, 1986. SA 26. DACO recognized that, due to price increases for gasoline in the U.S. markets and recent increases in the price of crude petroleum, this would cause losses for the wholesalers, but self-servingly justified this confiscation as properly chargeable against first-quarter 1986 profits.[6] Wholesalers were forced to sell below their acquisition cost of gasoline on a current basis, beginning in late April and at least through May 21, 1986. SA 26. Just like the March 26 order, the purpose of DACO's April 23 order to wholesalers was to make sure that consumers at the gasoline pump would not pay the new excise tax. SA 6, 5 n. 3. The wholesalers' April 23 order scheduled a hearing on the desirability of profit margins, JA 11, which the trial court found "had no meaningful purpose." SA 33.

On May 20, 1986, in a last-minute effort to avoid next day's trial on mootness grounds, SA 29 n. 11, 35, DACO issued the last of the three regulatory orders at issue herein. JA 21-29. DACO claimed in

[6]Later on, DACO's May 20 order would admit that its April 23 order had been confiscatory, recognizing, by way of understatement, that post-March 31 "significant increases in the costs being paid by wholesalers" had forced them to sell "at or near their cost." JA 23.

this order that since January 28, 1981 it had established certain price margins. JA 21. This claim had no basis in fact. No such margins had been established. SA 12-13, 14, 50; JA 85, 86, 89, 97. DACO further claimed that there was "abundant evidence" that wholesalers had abided by said nonexistent margins, JA 21, which claim also had no basis in fact. The trial court found no such "abundant evidence." SA 16-17, 43-44, 46, 52. The order also claimed that wholesalers did not pass on their cost reductions to retailers. This claim likewise had no basis in fact, as shown above, n. 5.[7] Relying on these and other baseless claims, the order then classified wholesalers into two groups. The first would be held to a maximum gross profit margin of 8.6¢/gallon. SA 30; JA 24. The second group would be held at a confiscatory margin of 3.6¢/gallon, SA 30; JA 24-25, indefinitely into the future, SA 66-67.

DACO claimed in this order that its "ultimate objective" was "allowing competitive forces to be the ones that control prices," JA 27, "to attain a situation where primary reliance can be placed on competitive market forces to maintain fair margins at all levels of distribution and fair prices for the consumer," JA 28, and "attaining as soon as possible a situation in which the competitive forces are primarily dependent upon forces to regulate gasoline in the gasoline markets in Puerto Rico." JA 29.[8] Ironically, this is exactly what national policy dictates.

This whole regulatory nightmare was aptly described by the trial court, SA 36-37, and equitable relief followed. SA 66-67.

District Court Proceedings

After reviewing general preemption principles, pertinent federal statutes and legislative histories, the trial court found DACO's March 26, April 23 and May 20, 1986 orders (but no Puerto Rico

[7]DACO attempted to prove this claim at trial with four exhibits, nos. 1, 2, 3 and 6, but they were not admitted into evidence because they were unreliable. SA 20. DACO did not even offer the contents of said exhibits into evidence and clearly waived its right to contend on appeal that they were improperly excluded. JA 80-83, 94-96. DACO had no other documentary evidence to support this claim.

[8]Or, "returning, as quickly as possible, to primary reliance on competitive market forces to regulate gasoline markets in Puerto Rico." PA 57a.

statute) to be preempted on the ground that national policy established by Congress dictated that market forces and not the government should regulate gasoline prices and profit margins. SA 67-87, 92, 94.[9]

Significantly, the trial court found broad areas of regulation not preempted: state laws providing for emergency allocation of petroleum products to alleviate a shortage within the state caused by damage to or destruction of facilities resulting from sabotage, accidents or an act of God; state laws that promote energy conservation, or restrain demand for petroleum products, such as odd-even management programs, minimum purchase requirements, car-less day and parking restrictions, fuel switching requirements, car pooling programs, and speed limits; and state laws designed to accomplish regulatory goals unrelated to emergency preparedness, including consumer education, fair trade, antitrust and tax laws. SA 85-86. TECA affirmed this holding. PA 18a.

TECA Proceedings

Exercising exclusive jurisdiction over the preemption issue, PA 4a-6a, TECA — "a court intimately familiar with the intricacies of federal energy regulations"[10] — upheld the trial court's preemption holding, concluding that Congress' intent in enacting the Energy Policy and Conservation Act of 1975 ("EPCA"), 89 Stat. 871 (1975), which amended the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 87 Stat. 627 (1973), was "to establish a market free of any government interference." PA 17a.

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[9]DACO claims that the trial court's May 16, 1986 consolidation of the hearings on the preliminary and permanent injunctions and its action at the May 20 pretrial conference deeming the complaints amended to also challenge DACO's order issued that same day were a "sudden and unexpected escalation of the stakes," despite which the trial "court held the parties to the May 21 trial date." DACO Br. 9. DACO failed to object to the consolidation before the trial court, on traditional grounds of lack of notice and prejudice. DACO never moved for a continuance of the May 21 trial and, quite to the contrary, told the trial court that it "had no problem" with commencing trial on May 21, that "the government is ready to go to trial tomorrow if that is your wish," May 20, 1986 transcript 95, 96. DACO stated at the commencement of trial, without reservation, that it was "ready." May 21, 1986 transcript 3.

[10]*Tully v. Mobil Oil Corp.*, 455 U.S. 245, 248 (1982).

TECA scrutinized pertinent price control legislation, including the Economic Stabilization Act of 1970 ("ESA"), 84 Stat. 799, 12 U.S.C.A. § 1904 (note), the EPAA, the EPCA and subsequent legislative action, including the Energy Emergency Preparedness Act of 1982 ("EEPA"), 96 Stat. 248 (1982). TECA then followed this Court's preemption principle in *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board*, 474 U.S. 409, 88 L.Ed.2d 732, 744 (1986) (citing *Ark. Elec. Coop. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983)): "[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated and in that event would have as much preemptive force as a decision *to* regulate." PA 7a.

In *Transcontinental*, this Court concluded that the removal of authority from the Federal Energy Regulatory Commission ("FERC") to regulate a component of the gas industry was part of a federal scheme to rely on market forces to determine the supply and price of natural gas: "Congress denied FERC the power to regulate affirmatively...because it wanted to leave determination of supply and first-sale price to the market." 88 L.Ed.2d at 744. Thus, the congressional decision to rely on market forces was held to preempt state regulation which conflicted with market forces: "In light of Congress' intent to move toward a less-regulated national natural gas market, its decision to remove jurisdiction from FERC cannot be interpreted as an invitation to the states to impose additional regulations." *Id.*

TECA correctly adhered to this Court's mandate as expressed in *Transcontinental* and considered, just as in that case, whether Congress, in deciding to terminate federal regulatory authority in order to achieve a deregulated petroleum market, intended to give the states the power it had denied the President, or whether it intended instead to leave determination of supply and price to the market. In view of the legislative intent it found in the EPCA, as subsequently confirmed by the EEPA, TECA decided that DACO's regulations and orders were preempted by Congress' considered decision to forgo regulation of petroleum prices and profit margins so as to allow the interplay of market forces to set such prices and margins.

TECA denied DACO's petition for rehearing and suggestion for rehearing *en banc*. PA 28a.

SUMMARY OF THE ARGUMENT

A. A decision by Congress to forgo regulation, just as its decision to regulate, has preemptive force and thus state action that contradicts said congressional decision must yield. Preemption need not always be express; it can be implied in cases where state regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941). DACO's regulations represent an obstacle to the purposes and objectives of Congress, to wit, that gasoline prices be regulated only by the marketplace. In this context, it was perfectly legitimate for TECA to inquire whether federal law affirmatively permitted or contemplated such an obstacle.

B. Under the EPAA, federal regulation of the Nation's energy resources was pervasive, but was meant to be a short-term solution to the Nation's energy crisis caused by the oil embargo. In 1973, however, Congress recognized that a long-range policy was needed.

The EPCA ushered in a pivotal change when Congress adopted a national energy policy. As part of this policy, Congress decided to gradually terminate price controls by September 1981 and rely on market forces to determine the supply and demand of petroleum products. Through Title IV of the EPCA, Congress wanted to assure "a smooth transition of petroleum markets from a closely regulated state to a large[ly] unregulated status subject to standby pricing and allocation authority." S. Conf. Rep. No. 516, 94th Cong., 1st Sess. 204, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1956, 2045.

Congress recognized that "[t]he fundamental reality is that this Nation has entered into a *new era* in which energy resources previously abundant [will] remain in short supply, retarding the [Nation's] life habits and expectations," thus establishing *"the need for policy decisions at the national level."* H.R. Rep. No. 340, 94th Cong., 1st Sess. 2, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1762, 1763 (emphasized). Therefore, "[t]he recognition on the part of Congress that the United States was entering a new era...which necessitated a national energy policy belies [the] argument that the 1975 amendments to the EPAA signaled a return to the *status quo ante*, allowing states to regulate freely with regard to petroleum products." *Mobil Oil Corp. v. Tully*, 499 F. Supp. 888, 909

(N.D.N.Y. 1980), *aff'd*, 653 F.2d 497 (TECA 1981), *vacated and remanded*, 455 U.S. 245 (1982).

C. Post-1981 legislative history and enactments "strengthen [the] conclusion that Congress intended to rely on market forces to determine the allocation and prices of petroleum products." PA 14a-15a. The legislative debate regarding the Standby Petroleum Allocation Act ("SPAA"), S. 1503, 97th Cong., 2d Sess., 128 Cong. Rec. H409 (daily ed. Feb. 22, 1982), shows that "both supporters and opponents of the SPAA placed great reliance on market forces as the best means of avoiding supply disruptions." PA 15a. Thus, the regulatory authority which the SPAA granted the President was intended to be used only in cases of a "severe petroleum supply shortage," S. 1503, § 275(a)(1), 97th Cong., 2d Sess., 128 Cong. Rec. H. 410 (daily ed. Feb. 22, 1982), "[o]therwise, market forces would determine the allocation and prices of petroleum products." PA 15a. Despite the limited scope of the SPAA, the President vetoed the bill, refusing in the strongest terms "a general power to reimpose on all Americans another web of price controls and mandatory allocations" because "controls" shifted "losses...from one set of Americans to others" and caused "vast dislocations and loss of efficiency." 128 Cong. Rec. S2514 (daily ed. March 22, 1982). "The fact that the Senate sustained President Reagan's veto is further evidence of a strong national policy to rely on market forces, even in the case of an emergency." PA 15a-16a.

In 1982 Congress enacted the EEPA. This statute contains an explicit reiteration of the national policy, both in its declaration of policy and in its findings: "reliance on the free market." 42 U.S.C.A. § 6281(b). Thus, "Congress did not by enactment of the EEPA alter the free market policy it had expressed in the EPCA. Rather, it reiterated that policy." PA 16a.

D. The free market policy is equally strong today. The 1985 National Energy Policy Plan,[11] emphasizes the importance to national energy policy of allowing "the marketplace, rather than

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[11]President Reagan's letter transmitting the plan to Congress and the plan's "Introduction and Executive Summary" were reproduced as Appendix B to appearing respondents' opposition to petition for certiorari (hereinafter "Shell App."). Copy of the plan is being lodged with the clerk's office of this Court.

government, to make key economic decisions about energy." Shell App. 4. The plan recognizes that the "Nation learned lessons about energy in the 1970's that it must never forget." *Id.* at 22. Clearly "[t]he dismantling of price and allocation controls, and our determination to resist them in the future," have been the cornerstone for the Nation's energy policy in the 1980's. *Id.* at 13. The March 1987 Report on Energy Security,[12] reiterates that "[t]his country is committed to relying on market forces, rather than on government imposed solutions" for the Nation's energy security, both domestically and internationally, since "government price and allocation controls exacerbated the effects of...supply disruptions" and, hence, "market forces" are "the most efficient alternative."

E. DACO and *amici's* invitation to this Court to adopt a new preemption standard that would presume state authority restored when Congress deregulates a previously preempted area, unless Congress explicitly states otherwise in the deregulating statute, is untenable. Accepting such an invitation would require this Court to overrule established precedent, including *Transcontinental*, that preemption can be implied when a state regulation stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

In analyzing a congressional decision to deregulate, this Court has traditionally looked to the scope of the previously established federal regulatory scheme and whether, in revising said scheme, Congress has continued to manifest a federal interest by a considered decision to allow market forces to govern pricing and allocation of products.

Having determined that Congress' intent was "to establish a market free of *any* government control other than standby emergency controls," PA 14a, TECA followed *Transcontinental*, where this Court considered the preemptive effect of Congress' decision to deregulate the natural gas market and concluded that the removal of authority to regulate a component of the gas industry was part of a federal scheme to rely on market forces. The issue here, just as in that case, is whether Congress, in deciding to terminate federal regulatory authority in order to achieve a deregulated petroleum market, intended to give the states the power it had denied the President, or

[12]Copy of the Report to the President on Energy Security is being lodged with the clerk's office of this Court.

whether it intended instead to leave determination of supply and price to the market. In view of the legislative intent of the EPCA, as subsequently confirmed by the EEPA, the answer to that inquiry in this case is the same as in *Transcontinental*: DACO's regulations are preempted by Congress' considered decision to allow market forces to determine prices and allocations of petroleum products. As the NGPA considered in *Transcontinental*, the EPCA did not represent a retreat from federal concern over the petroleum industry, but rather ushered in a comprehensive national energy policy where the petroleum markets were deliberately left unregulated.

F. TECA's decision is not barred by *Tully*. This Court faced *Tully* in a different context than that faced by TECA in this case, because in *Tully* the parties did not brief, before TECA or this Court, the preemptive effect of the expiration of presidential authority to control prices. This Court in *Tully* summarily ruled that the judgment and injunction were not appropriately framed for review, and remanded the case to TECA "for reconsideration in light of the expiration of federal price control authority under the EPAA." 455 U.S. at 249. Moreover, neither TECA nor this Court had in *Tully* the benefit of post-1981 legislative and executive actions shedding light on congressional intent and the national policy in this field.

G. In contrast with *Tully*, in *Mobil Oil Corp. v. Dubno*, 492 F. Supp. 1004 (D. Conn. 1980), *aff'd in part, dismissed in part*, 639 F.2d 919 (2d Cir.), *cert. denied*, 452 U.S. 967 (1981), the court made a comprehensive preemption analysis of the EPAA and the EPCA concluding that exemption from price controls constituted "an affirmative federal decision that petroleum products should be free from all price regulation." 492 F. Supp. at 1013-1014.

H. DACO's regulations potentially represent a chaotic regulatory structure, which Congress cannot be presumed to have intended. It was quite proper for TECA to inquire whether Congress contemplated or authorized such potential chaos, to wit, "the possibility of over 50 individual regulatory schemes operating in the petroleum products markets." PA 13a.

I. Puerto Rico, like any state, is bound by the Supremacy Clause, regardless of whatever claim to unique, local market conditions they may make. Thus, DACO's regulations must stand preempted in spite of such a claim.

J. Because of the trial court's finding that their types of statutes were not preempted, affirmed by TECA, *amici's* concerns that the TECA decision would somehow affect their statutes is abstract and hypothetical and need not, and should not, be addressed by this Court. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341-356 (1936)(Brandeis, dissenting).

ARGUMENT

I. By Forgoing Regulation, Congress May Preempt State Regulation Which Constitutes an Obstacle to and Contradicts National Policy.

This Court has stated that "a federal decision to forgo regulation in a given area may imply an authoritative determination that the area is best left unregulated, and that event would have as much pre-emptive force as a decision to regulate." *Ark. Elec. Coop.*, 461 U.S. at 384 (citing *N.L.R.B. v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971); *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 155 (1982)).[13] Congress may decide to regulate as well as to exempt from regulation, *e.g.*, by endorsing free competition instead of state regulation. When Congress thus ordains the priorities, any ambiguity should be resolved in favor of competition rather than state regulation. *I.C.C. v. Texas*, 479 U.S. __, 93 L.Ed.2d 809, 818 (1987). This is exactly what happened here. Congress decided to forgo regulation of, *inter alia*, gasoline prices in favor of competitive market forces, and this decision has preemptive force.

Just because Congress has not expressly legislated preemption, this does not foreclose its possibility. Preemption can be implied. *Aloha Airlines v. Director of Taxation*, 464 U.S. 7, 12 n. 5 (1983). Where Congress has intended to foreclose state legislative attempts to regulate a given area, these attempts are preempted. *Perry v. Thomas*, 482 U.S. __, 96 L.Ed.2d 426 (1987); *Southland Corp. v. Keating*, 465 U.S. 1 (1984). Federal law does not have to expressly

[13]Stated otherwise, the failure of the federal government to exercise its full authority may take on the character of a policy ruling that no regulation is appropriate or approved, in which case states are not permitted to use their police powers to regulate. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978).

forbid state regulation. If what the state attempts to do is what Congress contemplated should not be done, the state statute is preempted because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Michigan Canners, etc. v. Agricultural Bd.*, 467 U.S. 461, 477-478 (1984) (citing *Hines*, 312 U.S. at 67-68).[14]

By establishing regulation by the marketplace as national policy, Congress logically intended to prohibit whatever else would contradict said policy, *i.e.*, government regulation. DACO's regulations here constitute exactly the conduct that Congress sought to prohibit and therefore they are repugnant to the Supremacy Clause. *Rose v. Arkansas State Police*, 479 U.S. __, 93 L.Ed.2d 183 (1986).

II. The Legislative History of the Relevant Statutes Confirms Congress' Intent to Preempt Puerto Rico's Price Regulations.

A. Historical Background on Price Controls.

Price regulation by the federal government has responded to different realities at various historical moments. Initially, federal price controls of various essential commodities, including oil, were enacted during World War II. Emergency Price Control Act of 1942, 56 Stat. 23. This act was extended through 1946 to provide for a transition to peace-time economy. Price Control Extension Act of 1946, 60 Stat. 664. During the Korean War, the federal government again exercised price control powers. Defense Production Act of 1950, 64 Stat. 798.

In 1970, in an effort to control inflation, the ESA authorized the President to temporarily impose price controls. ESA applied to Puerto Rico. 12 U.S.C.A. § 1901(k). This price control authority was originally destined to expire on February 28, 1971, but was extended to April 30, 1974.

[14]In *Michigan Canners*, this Court rejected the view of the Michigan Supreme Court that there was no preemption because the federal statute did not expressly forbid the action authorized by Michigan law. 467 U.S. at 477.

B. In 1973 Congress Implemented a Short-Term Solution to the Nation's Energy Crisis.

In the early 1970's, the United States experienced a shortage of crude oil and its byproducts. Severe market disruptions caused by the Organization of Petroleum Exporting Countries' ("OPEC") oil embargo of 1973 exacerbated the fuel shortage crisis. For the first time, Congress saw a particularized need to implement price regulations to deal specifically with oil products. In the EPAA, 15 U.S.C.A. §§ 751 *et seq.*, Congress determined that shortages of oil caused by inadequate domestic production, environmental constraints and unavailability of imports constituted a national energy crisis requiring prompt action by the executive branch. 15 U.S.C.A. § 751(a)(1)-(3).

Therefore, Congress enacted the EPAA for the purpose of granting the President specific temporary authority to deal with these shortages, to minimize their impact and to avoid the accompanying dislocations. H.R. Conf. Rep. No. 628, 93rd. Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2688. Congress seemed to mistrust the free market's capacity to deal with actual and imminent fuel shortages. *Id.* Believing that the self-regulating laws of supply and demand were not operating properly in the petroleum market, Congress saw a need for the federal government to intervene in the market in response to the crisis. *Id.*

However, Congress recognized that its goals of economic efficiency and a sound and competitive petroleum industry were generally better served by competitive markets than by administrative measures. H.R. Rep. No. 531, 93rd Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2582, 2596. Recognizing that mandatory price regulation would distort the economy and interfere with free market mechanisms, Congress' objective was to minimize unnecessary interference in the market. 15 U.S.C.A. § 751(b). The internal tension or contradiction was thought to be resolved by the fact that federal regulation under the EPAA was to be temporary (up to February 28, 1975). § 4(g)(1) of the EPAA, 87 Stat. 632.

The EPAA only provided for the adoption of a scheme of comprehensive allocation and pricing regulations, in accordance with

specific statutory guidelines.[15] The result was a heavily regulated market.

Congress did not set out in the EPAA to establish a comprehensive national energy *policy*. The EPAA focused on short-term objectives. The Conference Report, from which DACO quotes, Br. 21, is extremely revealing:

> By way of initial emphasis it should be noted that the bill which the Conference Committee reports today is not designed to and should not be interpreted as increasing supplies of critically short petroleum products. The shortage problem is the result of policies which have been in effect over a number of years, and it awaits a more far reaching and long ranged solution. Instead, *this bill focuses on the short-term objectives* of seeing to it that during times of shortage our priority needs are met and that whatever limited supplies we have are equitably distributed throughout the nation to meet regional needs and preserve competition in the marketplace. H.R. Conf. Rep. No. 628, 93rd Cong., 1st Sess. 13-14, *reprinted in* 1973 U.S. Code Cong. & Ad. News 2688, 2690-91 (emphasized).

Because Congress knew that the problem would recur, it recognized that a "far reaching and long ranged solution" was needed through the adoption of appropriate policies. Thus, even though the 1973 embargo conditions were subsiding, the EPAA's duration was extended, initially through August 31, 1975, 88 Stat. 1608, then through November 15, 1975, 89 Stat. 481, and finally through December 15, 1975, 89 Stat. 694, due to the fact that Congress and the President could not reach mutual agreement on a long-term

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[15]Contrary to Puerto Rico regulations, the EPAA specified that price regulations would provide for a dollar-for-dollar pass-through of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products to all marketers or distributors at the retail level. 15 U.S.C.A. § 753(b)(2)(A). *See also* H.R. Rep. No. 531, 93rd Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2582, 2594; H.R. Conf. Rep. No. 628, 93rd. Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2688, 2701-2702. Federal price regulations provided for adequate compensation to assure that private property was not implicitly confiscated by the government. *Id.* at 2596-2597 and 2703. *See also* SA 11-12.

petroleum pricing policy — a goal they had set out to accomplish since 1973.[16]

Throughout this period, there was a "battle of vetoes" between President Ford, who wanted immediate decontrol, and Congress, which resisted. 121 Cong. Rec. H1403 (daily ed. March 5, 1975) (veto message of March 4, 1975); 121 Cong. Rec. S15,609 (daily ed. September 9, 1975) (veto message of September 9, 1975). Some resistance was due to fear of inflation that could result from sudden decontrol. Other resistance was not to decontrol *per se*, but rather to its immediacy, as insisted by the President. Those espousing this "moderate" view preferred gradual decontrol, doubting that there were "enough computers in Washington and enough bureaucrats down here to be wiser than the market over a period of time;" believing that there was "no substitute for the free market" and that price regulation caused shortages, "the kind of trouble we get into when, with our wisdom, we try to regulate what should happen in the market economy." 121 Cong. Rec. S15,613, S15,615 (daily ed. September 9, 1975) (remarks of Sen. Percy).

C. In 1975 Congress and the Administration Ushered In a New National Energy Policy of Ultimate Reliance on the Free Market as the Sole Regulator of Prices and Allocations of Petroleum Products Thereby Preempting All Inconsistent State Regulatory Attempts.

After long and hard work, Congress enacted the Energy Policy Conservation Act ("EPCA"), 42 U.S.C.A. §§ 6201 *et seq.*, signed into law on December 22, 1975.[17] As its name reflects, the EPCA

[16]This belies DACO's argument that, upon expiration of federal price control authority, Congress meant a return to pre-1973 conditions. Congress and the President battled long and hard to adopt policies providing a "far reaching and long ranged solution" to the problem with reliance on the market as the ultimate regulator.

[17]The EPCA originated in four separate Senate bills — S622, S349, S677 and S1883 — and a House bill, H.R. 7014. S622 was passed in lieu of the House bill after substituting for its language much of the text of the House bill. S. Conf. Rep. No. 516, 94th Cong., 1st Sess. 116, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1956, 1957. The Senate considered the bill on April 10, July 8, 11 and 15, September 26 and December 15, 1975. The House, on September 23 and December 15, 1975. 1975 U.S. Code Cong. & Ad. News 1762.

ushered in the much awaited, long-term national energy *policy* and provided for the implementation of a comprehensive scheme for attaining solutions to the Nation's energy problems, assuring a much needed security both domestically and internationally.[18]

Much of the congressional debate on the EPCA centered on the issue of price controls. The President was convinced that price controls, instead of diminishing, exacerbated the crisis. He was pushing for immediate decontrol. H.R. Rep. No. 340, 94th Cong., 1st Sess. 7, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1762, 1769. The Senate was inclined to favor the President, but wanted the assurance of standby authority in the event of a new crisis. S. Rep. No. 26, 94th Cong., 1st Sess. 22-23 (1975). So did the House. H.R. Rep. No. 340, 94th Cong., 1st Sess. 59, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1762, 1820. However, there is no dispute that Congress agreed with the President on the long-term goal of a free market as the ultimate regulator of prices.[19]

[18]During the Senate debate on S622, Senator Humphrey summarized the long and hard fought battle between Congress and the Executive, finally leading to adoption of the EPCA:

> After 10 long months, we have finally pieced together a national energy policy — which, despite President Ford's vacillations, was developed with the administration and one which will take us a long way toward energy independence...This policy is the fruit of a difficult process of compromise; a process characterized by bitter words between Congress and the President; and a process characterized repeatedly by both presidential and congressional vetoes of energy proposals...Facing the alarming prospect of sudden oil price decontrol on November 15, Congress and President Ford were confronted with a difficult choice: They could continue the increasingly acrimonious and seemingly endless debate over decontrol; or they could compromise on the issue of oil prices and clear the way to establishment of a national energy policy.
>
> Congress was able to forestall the administration's decontrol scheme and the President was able to forestall a continuation of price controls. Compromise was necessary and compromise we did. 121 Cong. Rec. S22,512-S22,513 (daily ed. December 17, 1975).

[19]Congress stated:

The President has done a good job in identifying the objectives which underlie his energy program. Specifically, his proposals are designed to reduce oil imports...and by 1985 to make this nation invulnerable to another oil embargo.... The underlying thesis is that the market mechanism constitutes the most efficient and equitable

Congress decided that even though the circumstances justifying the enactment of the EPAA were no longer extant, the return to an unregulated market should be gradual. Thus, it reenacted the EPAA's price and allocation controls for the purpose of conferring on the President the power to periodically exempt products from regulation until a state of total deregulation was achieved:

> The United States still faces a critical energy problem. However, the dimensions of that problem are far different from those which existed in 1973 and were addressed by the EPAA....
>
> In view of these changed conditions, a comprehensive regulatory structure of the scope outlined above may no longer be necessary. On the other hand, to allow such a comprehensive structure to expire, overnight, may itself create severe dislocations. To the extent that mandatory controls are no longer needed or desirable, a gradual return to an *unregulated market* is preferable to sudden decontrol....
>
> Extension of the EPAA and its conversion to a standby authority offers, in addition, the potential for a smooth transition of petroleum markets from a closely regulated state to a large[ly] unregulated status subject to standby pricing and allocation authority.... S. Conf. Rep. No. 516, 94th Cong., 1st Sess. 203-204, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1956, 2045 (emphasized).

Congress also expressed its considered determination on the future regulation of oil:

> The fundamental reality is that this nation has entered a *new era* in which energy resources previously abundant, will remain in short supply, retarding our economic growth and necessitating an alteration in our life's habits and expectations. The Arab embargo raised public consciousness of energy problems and underscored more effectively than could any

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allocator of resources. As a matter of general economic theory, the Committee would agree. But the thesis does not take proper account of existing circumstances.... The purpose is to chart a course premised upon more gradually, and more certainly, obtainable demand and supply objectives. H.R. Rep. No. 340, 94th Cong., 1st Sess. 3-4, 9, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1762, 1765-1766, 1771.

> other event the *need for policy decisions at the national level*. H.R. Rep. No. 340, 94th Cong., 1st Sess. 1, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1762, 1763 (emphasized).

DACO suggests that, in spite of this clear congressional language, Congress meant simply to return "to the market as it existed prior to enactment of the EPAA, where the states indisputably possessed the power to regulate the industry at the local level." DACO Br. 27. This suggestion is unfounded. Congressional history undoubtedly shows that Congress recognized the Nation had entered a new era requiring policy decisions at the national level; that in spite of the changed conditions prevailing in 1975, the Nation still faced a critical energy problem, although of different dimensions; that the long-range solution to the problem was to allow market mechanisms to determine the allocation and prices of petroleum products in order to achieve greater domestic productivity and lessen dependency on foreign imports; and that the ultimate goal of an unregulated market should be achieved gradually, to minimize economic dislocations and distortions.[20] Thus, as TECA concluded: "[t]he EPCA's gradual decontrol evidences a carefully controlled transition to an unregulated market." PA 13a.

Contrary to DACO's assertion, it is clear from the legislative history that Congress' reference to an unregulated market upon removal of federal controls meant regulation by the market forces of supply and demand, *i.e.*, that the free market, and not the fifty states or any one of them, or Puerto Rico, be the ultimate regulator of the Nation's energy supply and demand. Congress not only discussed the *manner* in which federal controls should be removed, DACO Br. 28, but also the *mechanism* that would supplant such controls: the free market; not federal or state regulation. Such was precisely TECA's conclusion:

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[20]In explaining the scope of the authority granted the President to gradually exempt products from regulation, the Conference Report stated:

> Any proposed exemption with respect to price must be accompanied by a finding that (1) *competition* and *market forces* would provide adequate protection for the consumer, and (2) such amendment would not result in inequitable prices for any class of users. S. Conf. Rep. No. 516, 94th Cong., 1st Sess. 204, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1956, 2046 (emphasized).

> It is inconceivable that Congress would implement such an extensive and carefully orchestrated termination of federal intervention with the intention that the states step in to regulate the same subject matter as soon as all federal intervention ceased. A single state's regulation of petroleum products may not have a substantial effect on national markets. However, the possibility of over 50 individual regulatory schemes operating in the petroleum products markets clearly conflicts with and frustrates Congress' goal of allowing market forces to regulate the supply and price of petroleum products. PA 13a-14a.

The EPAA contained a preemption provision. 15 U.S.C.A. § 755(b). DACO makes much of the language of this provision, as well as of the fact that Congress did not expressly amend it in 1975. DACO Br. 24-25, 29. DACO, apparently adopting an argument advanced by the Solicitor General in the petition stage and now largely abandoned in his brief on the merits, seems to argue that the language of the provision allows no interpretation but that under the statute there is preemption only when a federal regulation is in place with which a state regulation conflicts. However, DACO concedes that during the phase-out period there was preemption. DACO Br. 27. During that period, when some products were exempted from federal regulation, § 755(b) preempted state regulation even as to those products. *Mobil Oil Corp. v. Tully*, 653 F.2d at 502; *Mobil Oil Corp. v. Dubno*, 492 F. Supp. at 1014. As TECA recognized, "throughout the transition the federal scheme continued to preempt state regulation in the area, even with respect to exempted products." PA 13a.

DACO and the Solicitor General seem to invite this Court to abandon well-established preemption principles and the long line of precedent of which *Transcontinental* is among the most recent expressions, by requiring an express preemption provision for there to be preemption.[21] This Court has long recognized that when the federal government has decided to forgo regulation, any state law that purports to regulate stands as an obstacle to the accomplishment of congressional objectives, and is, of necessity, preempted. *Trans-*

[21] An argument which only some *amici* make explicitly. Nat. Br. 9-13.

continental, 88 L.Ed.2d at 744. Such is precisely the situation at bar. The legislative history clearly shows Congress did not merely let presidential authority expire on September 30, 1981, but rather made an affirmative decision, after careful consideration, that *no* regulation was appropriate in light of the newly established comprehensive national policy.

The EPCA is divided into five parts. Title IV gradually deregulated the petroleum products market and established a national policy in favor of market forces, allowing the President's regulatory authority to expire on September 30, 1981. But the EPCA is much more comprehensive than just its Title IV.[22] In Titles I and II, the EPCA provided the President with discretionary authority to respond to petroleum supply shortfalls in the domestic and international markets by restricting exports of energy supplies, 42 U.S.C.A. § 6212; requiring accelerated oil and gas production from certain fields, 42 U.S.C.A. § 6214; establishing and using a Strategic Petroleum Reserve, 42 U.S.C.A. § 6234; implementing certain international agreements of the United States, 42 U.S.C.A. §§ 6271, 6272, 6274; and requiring allocation of supplies, materials and equipment to maximize domestic energy supplies, 50 U.S.C.A. App. § 2071. In providing the President with authority to implement the United States' international agreements, Congress provided him *exclusive*

[22] The suggestion by the Solicitor General that TECA could not take into consideration the EPCA's other titles, since only Title IV amended the EPAA — TECA's jurisdictional scope (Sol. Br. 20 n. 9) — is unfounded. In interpreting the meaning of a section of a statute, a court not only may, but should, take into consideration the entire statutory scheme and background to afford such part of the statute its proper meaning.

The Solicitor does not dispute TECA's finding that the EPCA's enactment "evidence[d] congressional recognition of the continuing necessity for a strong national policy on energy," nor "TECA's implication" that those other titles have the same effect as the continuing regulatory structure in *Transcontinental*. The Solicitor simply ignores such findings, which support continuing preemption in this case. TECA did not and this Court should not ignore Congress' recognition of "a continuing necessity for a strong national policy on energy" nor Congress' reasons for having so legislated. Finally, the Solicitor concedes that there is a national energy policy but argues that only Titles I, II, III and V frame such national energy policy. Again, the Solicitor is mistaken, since Title IV of the EPCA is as much an integral part of that policy as the other titles which form part of the statute.

authority to require oil companies to allocate products at specific prices to countries participating in said agreements. 42 U.S.C.A. § 6271.

Title III of the EPCA amended the Motor Vehicle Information and Cost Savings Act to provide for automotive fuel economy standards. The EPCA further established an energy conservation program for consumer products other than automobiles. 42 U.S.C.A. §§ 6291-6296.

Title V of the EPCA contains general provisions, including the development of an energy data base and authority for FEA to require that persons engaged in oil and gas production keep energy information developed pursuant to 42 U.S.C.A. §§ 6381-6383 and 15 U.S.C.A. § 796 and submit reports with respect to the same. Title V also provides for preemption of state laws or programs that may conflict with the provisions of Titles I and II or the rules, regulations and orders issued thereunder. 42 U.S.C.A. § 6396.

Within the context of this comprehensive national energy policy, Congress' decision to gradually remove allocation and price controls certainly reflects its careful and considered decision to forgo regulation and cannot be interpreted as a termination of federal concern in this area.

Consistent with this national policy, the President began exempting products until, on January 28, 1981, he completed the process of total deregulation through Executive Order No. 12,287. 46 Fed. Reg. 9,909.

III. Post-1981 Events Reinforce Congress' Intent to Establish A Market Free of Any Government Interference.

In 1981, Congress conducted hearings on the Nation's preparedness for a future energy crisis in view of the impending termination of the President's standby authority. DACO Br. 30 n. 31. During the preceding two years, the Nation experienced another oil supply disruption as a result of the 1979 Iranian revolution and the 1980 Iran-Iraq war. Congress wanted to insure that the Nation would be prepared to respond to any such future disruptions. However, since the experience of controls had been so negative, the debate this time centered on whether market mechanisms already in place should be displaced at all in such an event. But there was no doubt in anyone's

mind that a free market was the cornerstone of the Nation's energy policy. Thus, the concern was whether or not to put into place authority to replace the market in case of a *new emergency*.[23]

Whether federal controls or market mechanisms should be replaced by state action was not an issue during those hearings. There was general agreement that the free market would be the best assurance of continuing energy health and security and that this mechanism should be replaced only in the most extreme circumstances created by severe supply disruptions. It was within this context that some expressed concern on the possible effect of intervention by the states in the event of supply disruptions. There was some speculation on whether preemption would survive expiration of the presidential standby authority on September 30, 1981. But one conclusion from these hearings is evident: in spite of this speculation, both supporters and opponents of standby authority were in favor of continued preemption of state laws that would disrupt the market as the ultimate regulator.[24]

The common concern of Congress and the deponents, including representatives of the Administration, private enterprise and the states, was preparedness of the United States in case of a crisis. The common goal was to depart as little as possible from market forces and avoid, except as strictly necessary, a new web of regulations.

In this context, in early 1982, Congress enacted the SPAA, under which the President would have standby authority to interfere with market prices of petroleum products in the event of an emergency

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[23]Senator Murkowski, the presiding officer at these hearings, summarized this concern. *Government Responses to Oil Supply Disruptions: Hearings on S. 409, S. 455, S. 1354, S. 1476 and S. 1503 Before the Senate Committee on Energy and Natural Resources*, 97th Cong., 1st Sess. 1-2 (July 28 and 30, 1981).

[24]The states, through the National Governors' Association, supported reliance on the marketplace to allocate supplies even in the event of low to moderate levels of shortfall: "[t]he states are already on record supporting a 4-tier approach which relies on the marketplace to allocate supplies during low to moderate levels of shortage, but which makes available a variety of policy options of increasing severity to deal with shortages of increasing magnitude." *Oil Emergency Preparedness: Hearings on H.R. 4313 Before the House Sub-Committee on Fossil and Synthetic Fuels of the Committee on Energy and Commerce*, 97th Cong., 1st Sess. 28 (1981).

shortage. The President vetoed the bill, precisely because it was in conflict with the federal policy of deregulation, stating:

> [W]hat I do not have, do not want and do not need is a general power to reimpose on all Americans another web of price controls and mandatory allocations....
>
> Controls can only shift losses [due to supply disruptions] from one set of Americans to others, with vast dislocation and loss of efficiency along the way. This was very amply demonstrated during the supply interruptions of 1973-74 and 1978-79. Those interruptions precipitated much higher oil prices, but they did not cause gas lines and shortages. It took government to do that. 128 Cong. Rec. S2514 (daily ed. March 22, 1982).

DACO argues that Congress' failure to override the President's veto of a bill containing an express preemption provision "cast[s] further doubt on whether Congress has ever had the requisite 'clear and manifest' congressional intent to preempt state law." DACO Br. 34. On the contrary, the fact that Congress included an express preemption provision in this emergency bill leaves no doubt as to congressional intent. This legislation failed. But it failed on grounds which further support the national energy policy of allowing the free market to be the sole allocator of products and sole regulator of prices. Senator McClure, one of the sponsors of the SPAA, summarized the reasons for its rejection as follows:

> [F]ar too many have equated this bill with an extension of EPAA. We have tried very hard over the last year to distinguish what it is we are trying to do here from EPAA. Those people who had problems with allocations under the EPAA have constantly referred to this legislation as a reenactment of, or an extension of, the allotments, price controls, and regulatory nightmare that we did see under EPAA, which this is not... This is a very, very strictly limited piece of legislation, much more confined and confining in its terms than was EPAA...a very limited, very temporary authority....
>
> [T]he President contends that the legislation was based on the assumption that giving the federal government the power to allocate supplies and set prices will result in an equitable and orderly response to a supply interruption. To the contrary, the

> legislation was based on the opposite assumption, which is that the free market is the most efficient allocator of supplies during a shortage. Only in the event of a severe and prolonged disruption, after it becomes apparent that free market mechanisms can no longer allocate supplies adequately, would Federal allocation be employed....
>
> [T]he President suggests that by again proposing Government controls, we have ignored the lessons learned from the supply interruptions of 1973-74 and 1978-79. The opposite is true. Unlike the now expired EPAA, the new legislation does not require a comprehensive and complex pricing and allocation program applied throughout the petroleum marketing system.... 128 Cong. Rec. S2722-S2723, S2724 (daily ed. March 24, 1982).

Even with the limited scope of the SPAA, Senator McClure's and other senators' efforts to override the presidential veto failed, precisely because Congress decided to give a vote of confidence to the President that the only price and allocation controls be provided by free, unimpeded market forces. Thus, Senator Humphrey, a key figure in the congressional debate on the adoption of the EPCA amendments to the EPAA, in response to his colleagues, stated in no uncertain terms:

> *Let us give the free market a chance*... there was a fundamental agreement among all parties that the free market can invariably allocate resources more efficiently than any Federal bureaucracy... President Reagan is fully committed to *this free market policy, and I would remind my colleagues that it is this policy that has resulted in the present ample supplies and declining prices of petroleum products since the decontrol of oil 1 year ago*. 128 Cong. Rec. S2732 (daily ed. March 24, 1982) (emphasized).

This only serves to emphasize that the discussions on whether to override the presidential veto did not center on preemption,[25] but on

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[25]DACO's characterization of the discussion of preemption during this debate as one of its "rallying points" is exaggerated. Senator Jackson was practically the sole voice specifically addressing this issue. His remarks, when taken in the appropriate context, further evidence that the President vetoed the bill convinced that the veto

the interference the SPAA would have had on free market forces, and for that reason, the veto was sustained. As TECA correctly concluded: "The fact that the Senate sustained President Reagan's veto is further evidence of a strong national policy to rely on market forces, even in the case of an emergency." PA 15a-16a.

In any event, the SPAA's preemption provision was more limited in scope than DACO claims. DACO Br. 32, 34. The Senate Committee's report thus explains the provision:

> Section 6(a) states the circumstances under which this Act preempts State and local law. The Committee intends that any State or local program for the allocation or pricing of petroleum be preempted if no Federal regulatory program has been implemented under this Act. Once the Federal Government activates a Federal program, any State or local program could nevertheless be implemented if, when compared to the relevant Federal regulation that is implemented, no conflict exists.
>
> However, when comparing a State or local program to its comparable Federal regulation, the fact that the Federal regulation is not implemented (even though a Federal program containing other Federal provisions may have been implemented) would automatically be deemed to constitute a conflict, and preemption of that State or local regulation would result....
>
> Only State and local petroleum price and allocation programs are affected by this provision. Consequently, such preemption would not apply to programs under State and local law intended to promote energy conservation or constrain energy demand such as odd-even management, minimum purchase requirements, car-less day requirements, and fuel switching requirements. Also preserved would be State emergency energy conservation programs pursuant to the

was the best way to assure the free market policy: "[t]here is a second major fallacy upon which the President's veto message is based, namely, that vetoing S. 1503 will keep Government from regulating the petroleum industry and will result in a free market for petroleum. There is a great deal of irony in the realization that President Reagan vetoed the bill that offered the only real chance for a free market in petroleum." 128 Cong. Rec. S2729 (daily ed. March 24, 1982). His colleagues, upon sustaining the veto, gave a vote of confidence to the free market policy.

> Energy Emergency Conservation Act of 1979, provided such programs do not include allocation and price controls. S. Rep. No. 199, 97th Cong., 1st Sess. at 19 (1981).

It is thus evident that Congress clearly intended to preempt all state allocation and pricing regulations while only allowing some flexibility to state and local governments to deal with the *local* impact of *petroleum disruptions* through regulatory mechanisms of other nature:

> The Committee adopted the preemption provision [Section 6 (a)] to provide State and local governments with some flexibility to address the local impact of petroleum disruptions while reserving to the Federal Government the authority to decide when Government regulation of petroleum allocation or pricing could occur. *Id.* at 15.

In late 1982, as a compromise with the President after his rejection of standby authority (the SPAA), Congress enacted the EEPA, as an amendment to Title II of the EPCA. 42 U.S.C.A. §§ 6201, 6281, 6282 (and other scattered sections). The statute reiterates the federal policy of reliance on the free market to determine prices of petroleum products:

> **(b) Policy**
>
> The Congress declares that it shall be the policy of the United States that the Federal Government shall be prepared prior to any shortage of petroleum products to respond to energy emergencies, pursuant to authorities under provisions of law other than this part, *as a supplement to reliance on the free market* to mitigate the adverse impacts of a shortage of petroleum products on public health, safety, and welfare. 42 U.S.C.A. § 6281(b)(emphasized).[26]

The EEPA addressed the emergency preparedness of the United States, both domestically and internationally. The act was meant "to amend the [EPCA] to extend certain authorities relating to the International Energy Program, to provide for the Nation's energy emergency preparedness through the preparation of a comprehensive energy emergency response procedure under [other authorities of

[26]The statutory findings expressly confirm this policy. 42 U.S.C.A. § 6281(a)(3).

law]; to assure [a minimum petroleum acquisition for the] Strategic Petroleum Reserve...." S. Rep. No. 393, 97th Cong., 2d Sess. 4, *reprinted in* 1982 U.S. Code Cong. & Ad. News 600.

Preemption was addressed in the EEPA. In the absence of standby emergency procedures, the Department of Energy ("DOE") was encouraging development of state contingency plans to deal with emergency situations. Congress was concerned that this would entail "[c]reation of more than fifty plans and regulations which may conflict with each other and with national plans and regulations." S. Rep. No. 393, 97th Cong., 2d Sess. 22, *reprinted in* 1982 U.S. Code Cong. & Ad. News 600, 618. Congress confronted DOE with this concern. DOE responded as follows:

> We anticipate that the States will recognize that putting in place mechanisms that did not work at the Federal level, would not work at State and local levels either.
>
> [I]n view of the fact that government intervention has proven in the past to create or exacerbate crises in the energy field, we certainly expect that the States would respect the lessons of history, and act accordingly. *Id*.

Not satisfied with this response, Congress required in the EEPA, 42 U.S.C.A. § 6282(a)(1), that the memorandum of law to be prepared by the Attorney General for submission to Congress address "energy *emergency* response management in coordination with state and local governments...." *Id*. (emphasized).

DACO refers to the memorandum submitted by the Attorney General and states that one of the conclusions therein "was that state petroleum price regulations are not preempted." DACO Br. 35 n. 37. However, DACO fails to specify where such conclusion was made. In the absence of guidance from DACO, wholesalers can only speculate that DACO must have been relying on the statement in the memorandum that "[i]n the absence of a relatively direct conflict between state and federal directives, we believe the statutory authorities available to the President to deal with an energy emergency *probably* would not be interpreted to contain an 'unambiguous' and 'compelling' mandate *to preempt state energy emergency provisions*." Office of Legal Counsel, Department of Justice, *Memorandum of Law, Legal Authorities Available to the President To Respond*

to a Severe Energy Supply Interruption or Other Substantial Reduction in Available Products 73 (Nov. 15, 1982) (emphasized). The memorandum was far from concluding that state petroleum price regulations are not preempted. Rather, the Attorney General simply was suggesting that state energy *emergency* provisions *probably* would not be preempted. Such was precisely Congress' intent in the SPAA and then in the EEPA, as interpreted by TECA: that state measures dealing with emergency situations be allowed, in the absence of specific federal provisions to the contrary. PA 16a-17a.

Thus, the EEPA disclaimed preemption of state *emergency* regulatory schemes then existing or subsequently enacted, 42 U.S.C.A. § 6282(c)(2), but only to the exent that no new federal emergency regulatory scheme be enacted. The preemption disclaimer was explained as follows:

> Additionally, [§ 6282(c)(2)] makes clear the intent of the conferees that the provisions of Part C would not in any fashion preempt state laws or programs already in effect or which would become effective after enactment of this Part. The authorities of the states to enact laws in anticipation of, or in response to, energy *emergencies* remain unaffected by this legislation. H. R. Conf. Rep. No. 663, 97th Cong., 2d Sess. 11, *reprinted in* 1982 U.S. Code Cong. & Ad. News 634, 637 (emphasized).

In the face of clear congressional statements to the effect that the market be unregulated; in view of the fact that § 6282(c)(2) is embodied in a statute providing for emergency situations; and in light of the House Conference Report's explanation of the scope of this provision, the EEPA's preemption provision can only be interpreted as an exception to preemption for *emergency* situations *exclusively*, and only if the state regulatory scheme does not interfere with a federal energy emergency regulatory scheme when one is in place. Such was TECA's conclusion. PA 16a-17a.

DACO argues, however, that TECA's interpretation that state regulation is prohibited during non-emergency situations but that such regulation is permitted during emergencies, is "strained," since during emergencies the need for a uniform national response is the greatest. DACO Br. 36. Such was not Congress' rationale. Congress' decision was to rely on the free market to the maximum extent

possible. Congress was concerned with a crisis of such large proportions that market forces would not be able to deal with it. Congress decided that the states should have some flexibility to address the immediate *local* impact of such a crisis until a federal regulatory scheme was put into operation by the President. At that moment, state emergency measures conflicting with such a federal program would be preempted and the goal of uniformity to respond to such a national crisis would be achieved. Thus, the disclaimer of preemption for emergency situations "[d]oes not evidence a congressional belief that preemption of nonemergency state and local price control authority did not survive the expiration of federal authority. The legislative history of the EEPA demonstrates Congress' continuing efforts to retain an unregulated market and is additional evidence of its previous intent to establish a market free of any government interference." PA 16a-17a.

The national policy of reliance on the free market reaches beyond domestic concerns as it responds to international commitments of the United States. The EEPA clearly states that the emergency preparedness plan must address the activities of the United States in support of the international energy program and the December 10, 1981 International Energy Agency Agreement ("IEA") entitled "Decision on Preparation for Future Supply Disruptions" (hereinafter the "Decision"). 42 U.S.C.A. § 6282(a)(3)(A)(i).

The Decision emphasized that free market forces should be allowed to operate in future energy supply disruptions because they counteract their effects. This was one of its primary features: "[r]ecognition that allowing market forces to operate and strengthening them will greatly counteract the effects of supply disruptions." S. Rep. No. 393, 97th Cong., 2d Sess. 8, *reprinted in* 1982 U.S. Code Cong. & Ad. News at 604.[27]

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[27]The commitment of the United States to a free unregulated market is such that, in spite of the clear language of the Decision, the United States deemed it necessary to stress its understanding of same:

> The United States welcomes this decision. At the same time we must state for the record our understanding of it. The United States remains committed to reliance on free market forces as the most effective response to supply disruptions. We are pleased to note the inclusion of this thought in a preamble to the Decision as a guiding principle for IEA discussions of market disruptions. *Id.* at 605.

DACO also makes reference to S. 1678, 129 Cong. Rec. S10,762 (daily ed. July 25, 1983), a bill introduced by Senator McClure in 1983, which contained several amendments to Title II of the EPCA, and characterizes it as a "final attempt to provide for the preemption of state petroleum price regulation." DACO Br. 37. Again, DACO has cited isolated language in favor of its position. As with other abortive congressional actions in this area, a careful review of the transcript of the hearings on S. 1678 shows both the Administration's and Congress' commitment to reliance to the utmost on free market forces. Mr. William A. Vaughan, Assistant Secretary for Environmental Protection, Safety and Emergency Preparedness, U.S. Department of Energy, presented the views of the Administration:

> The Administration, however, is concerned about certain other provisions in the bill. Some changes should be made in the section 2 statement of findings and purposes in order to more accurately reflect the policy of primary reliance upon the free market that the bill is directed at supporting, and to better characterize the circumstances under which private sector organizations might be utilized. First, this section should make clear that not only State and local, but also Federal pricing and allocation of petroleum could frustrate free market policies; less emphasis should be placed on Federal Government intervention in markets. Accordingly, we believe that section 2(a)(2) of the bill should be revised to read:
>
> "(2) individual State and local as well as Federal, pricing and allocation of petroleum could frustrate free market pricing and allocation of available petroleum supplies."

Energy Emergency Preparedness Act Amendments of 1983; and the International Energy Agency Program: Hearing Before the Senate Comm. on Energy and Natural Resources, 98th Cong., 1st Sess. 89, 92 (1983). The same letter quoted by DACO contains language almost identical to that quoted above, which establishes beyond doubt the Administration's policy of reliance on the free market. *Id.* at 606-607. *See also id.* at 49.

Thus, the Administration's views, when placed in their proper context, show that what the Administration did not support was a provision which would preempt state emergency statutes or regulations *before* there was a federal scheme in place. Be that as it may, the

fact remains that this bill died in committee. In contrast, all legislation actually enacted has reiterated congressional intent to assure the Nation's security through reliance on free market policies, domestically and internationally.

In 1985, Congress amended the EPCA to extend Titles I and II until 1989 and 1988, respectively, except for part A of Title II, dealing with rationing contingency plans, which expired on June 30, 1985. 99 Stat. 102. Congress explained this extension as follows: "For ten years, the authorities in these titles have been a basic component of our nation's preparation for an oil supply disruption." H.R. Rep. No. 152, 99th Cong., 1st Sess. 3, *reprinted in* 1985 U.S. Code Cong. & Ad. News 86.

IV. This Congressional Decision Has Served To Insure the Nation's Security Both Domestically and Internationally and Puerto Rico Should Not Be Allowed To Frustrate the Accomplishment of the Full Purposes and Objectives of Congress.

By 1985, the Administration's policy of a free market, as fully supported by Congress, was heralded as a major achievement. During the hearings on the EPCA amendments, the Administration's position was:

> President Reagan's complete decontrol of domestic oil prices was a major factor in encouraging domestic oil production and reducing U.S. dependence on foreign oil... The prudent policy for all Americans, as well as their Government, is to continue to work towards further deregulation of U.S. energy markets, so that the favorable trends of the past few years can continue. A firm commitment to policies that rely on the dynamic forces of the marketplace will contribute to this nation's energy and economic security and that of our allies. Emergency preparedness efforts at all levels should also continue. *Energy Policy and Conservation Amendments Act of 1985: Hearings on S. 979 Before the Senate Committee On Energy And Natural Resources*, 99th Cong., 1st Sess. 8-11 (May 1, 1985).[28]

[28]The Administration pursues the same deregulation policy in the natural gas market:

> Partial deregulation of the natural gas market is also an encouraging development. On January 1, 1985, about 50% of domestic natural gas production was decontrolled under the Natural Gas Policy Act. Partial decontrol will increase competition in the natural gas market. Natural gas prices have already fallen in real terms and may well continue that trend during the next few years. The Administration supports comprehensive deregulation to promote even greater competition and provide American gas consumers with lower and more stable natural gas prices. *Id.* at 11.

Thus, Congress' and the Administration's policies in oil and gas are no different. Consequently, this Court's rationale in *Transcontinental* with respect to natural gas is equally applicable with respect to oil. Partial deregulation of the natural gas market was but one stage in the gradual deregulation intended by Congress and the Administration. *Transcontinental* is directly controlling herein.

The free-market policy is very much alive and strong today. In presenting to Congress the 1985 National Energy Policy Plan, pursuant to Section 801 of the Department of Energy Organization Act, 42 U.S.C.A. § 7321, the President emphasized the importance to the national energy policy of allowing "the marketplace, rather than government, to make key economic decisions about energy." Shell App. 4. The Plan recognized that the "Nation learned lessons about energy in the 1970's that it must never forget." *Id.* at 22. Clearly, "[t]he dismantling of price and allocation controls, and our determination to resist them in the future," have been the cornerstone for the Nation's energy policy in the 1980's. *Id.* at 13. In fact, the free-market theme sounds throughout the plan and is an integral part of the Administration's goals in energy policy. The importance of the free market to the Administration is aptly summarized in the Executive Summary of the plan:

> Just a few days after being sworn in, the President decontrolled U.S. oil markets. Since then, the Nation has committed itself increasingly to rely on the resourcefulness and ingenuity of the American people in response to market forces. Heavyhanded government planning has been abandoned. The results that have flowed from these changes have been impressive. The American people are being served well.
>
> The United States must be able to explore for, locate, develop, and use new energy sources and conservation technologies. The record shows that this is done best in a climate of reduced government regulation, fewer controls, lower tax rates within a fair tax system, and a commitment to

> the principles of free international trade in energy. Unwarranted government intervention creates rigidities that prevent or discourage market forces from adjusting to change. Appropriate economic responses are blocked. Technological breakthroughs become far less likely.... *Id*. at 6-7.

History has proven that reliance on the free market contributes to the Nation's energy security. Just recently, in March 1987, the Department of Energy submitted to the President its Report on Energy Security, in fulfillment of Section 3102 of The Consolidated Omnibus Reconciliation Act of 1986 (Pub. L. 95-509). The report is but a restatement of the free-market policy in energy, the benefits reaped therefrom and the need for its continuation, as the following excerpts demonstrate:

> Fundamentally, a healthy economy in the United States rests upon the operation of free and competitive markets... [p. 9] ...oil price controls and allocation systems enhanced neither national security nor competition, yet they inflicted large net costs on the economy and they shortchanged most individual citizens.... [p. 10] ...The decision in the United States to follow a policy of reliance on market forces — epitomized by the instantaneous decontrol of oil prices in 1981 — undoubtedly had global repercussions. [p. 19] ...Preparations for dealing with potential supply disruptions in the 1990's are getting better: the United States has dismantled its programs for price control and allocation of oil so the market will be free to operate in response to future supply disruptions... [p. 36] Markets operate best when they are free of intrusive regulation, *in emergencies as well as during normal periods*. The cornerstone of U.S. energy emergency response policy is to rely on the free market, supported by the Strategic Petroleum Reserve in an oil supply disruption... [p. 212] This country is committed to relying on market forces, rather than on government-imposed solutions, while maintaining a proper concern for national security... [p. 227] ...government price and allocation controls exacerbated the effects of...supply disruptions. Reliance on market forces to allocate scarce supplies is evidently the most efficient alternative.... [p. 232] (emphasized).

V. TECA Correctly Applied Traditional Preemption Analysis and the *Transcontinental* Decision.

DACO urges this Court to abandon settled precedent and hold that when Congress deregulates an area where a preemptive federal regulatory scheme had been established, state authority be presumed restored, unless Congress explicitly states otherwise in the deregulating statute. DACO Br. 13, 18, 24. *See also* Sol. Br. 21; Nat. Br. 9-13. Ultimately, DACO wants this Court to set aside the analysis used in *Transcontinental*: "whether Congress, in revising a comprehensive federal regulatory scheme to give market forces a more significant role in determining the supply, the demand and the price of natural gas, intended to give the states the power it had denied FERC." 88 L.Ed.2d at 744.

A long line of cases, commencing with *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605, 613 (1926), and continuing through *Transcontinental* and *I.C.C. v. Texas*, 93 L.Ed.2d at 817-818, have clearly established that "a federal determination that deregulation [is] appropriate [is] entitled to as much weight in determining pre-emption as a federal decision to regulate actively." *Transcontinental*, 88 L.Ed.2d at 740. *See Ark. Elec. Coop.*, 461 U.S. at 384; *Ray*, 435 U.S. at 178. *See also Nash-Finch Co.*, 404 U.S. at 144; *Garner v. Teamsters Union*, 346 U.S. 485, 500 (1953); *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 774 (1947). In these cases, this Court found a congressional intent to preclude state action, after analyzing (a) the scope of the previously established federal program or policy, and (b) the scope of the congressional or federal determination not to regulate or to deregulate. In sum, *Napier* and its progeny, particularly *Transcontinental*, stand for the proposition that a congressional assertion of federal interest in a field, by establishing a comprehensive federal regulatory scheme, followed by a considered determination to deregulate and return certain decisions to market forces, has preemptive effect. *Transcontinental* best summarizes this two-pronged analysis.

In *Transcontinental*, this Court analyzed the scope of the initial comprehensive regulatory scheme established by the Natural Gas Act of 1938 ("NGA"), 52 Stat. 821, 15 U.S.C.A. §§ 717 *et seq.*, and of the congressional decision to deregulate high-cost gas in the Natural Gas Policy Act of 1978 ("NGPA"), 92 Stat. 3351, 15

U.S.C.A. §§ 3301 *et seq*. In finding preemption, this Court concluded: a) that Congress had created a comprehensive regulatory scheme to govern the sale of natural gas in the NGA; b) that said scheme began to fail in the early 1970's because the NGA's "artificial pricing scheme" caused an imbalance between supply and demand that generated gas shortages; c) that in response to said shortages and imbalance, Congress enacted the NGPA, because "a new system of natural gas pricing was needed to balance supply and demand;" d) that in the NGPA Congress withdrew from FERC the authority to regulate high cost or new natural gas "because it wanted to leave determination of supply and first-sale price [of high cost gas] to the market;" e) that "[i]n light of Congress' intent to move toward a less-regulated national natural gas market, its decision to remove jurisdiction from FERC [could not] be interpreted as an invitation to the states to impose additional regulation;" and f) that the state's order at issue disturbed "the uniformity of the federal scheme" by requiring compliance "with varied state regulations." 88 L.Ed.2d at 743-745.

Likewise, in this case TECA analyzed the scope of the initial comprehensive regulatory scheme established by the EPAA and of the congressional decision to deregulate petroleum products markets in the EPCA. In finding preemption, TECA concluded: a) that "[u]nder the EPAA... federal concern and regulatory authority in the... petroleum markets was pervasive [and] left little or no room for state and local regulation;" b) that "[t]he OPEC oil embargo and consequent supply disruption demonstrated the need for policy decisions at the national level;" c) that "[i]n enacting the EPCA, Congress found that due to changed conditions the federal regulatory structure no longer served the goals of the EPAA... [and] that the best mechanism to combat supply disruptions and the country's reliance on imported oil was to allow market forces to operate freely;" d) that "[t]he EPCA's gradual decontrol evidences a carefully controlled transition to an unregulated market;" e) that "[i]t is inconceivable that Congress would implement such an extensive and carefully orchestrated termination of federal intervention with the intention that the states step in to regulate [when] federal intervention ceased;" and f) that "the possibility of over 50 individual regulatory schemes operating in the petroleum products markets clearly conflicts with

and frustrates Congress' goal of allowing market forces to regulate the supply and price of petroleum products." PA 12a-14a.

Faced with the devastating language and analysis in *Transcontinental* and TECA's adherence to said case, DACO and the Solicitor try to read said case very narrowly and distinguish it, claiming that *Transcontinental* involved a revision of a "comprehensive federal regulatory scheme" which was part of a "consistent nationwide natural gas policy still subject of deep federal concern," where "one area has been deliberately left unregulated," DACO Br. 42; Sol. Br. 19-20, while the EPCA's deregulatory scheme is purportedly "the complete absence of federal regulation," DACO Br. 12, and similar to a congressional decision "not to legislate." Sol. Br. 13. Thus, they require here that wholesalers show the explicit language in the EPCA preempting state regulatory action in the petroleum industry which *Transcontinental* did not require in the NGPA. DACO Br. 24-25; Sol. Br. 10, 13.

First, as the NGPA, the EPCA does not represent a retreat from the federal government's role in establishing a uniform, national energy policy. Rather, the EPCA ushered in a comprehensive national energy policy.

Second, the Solicitor demands that the EPAA provision withdrawing authority from the President (15 U.S.C.A. § 760g), as added by § 461 of the EPCA, "explicitly or implicitly bar[] state regulation." Sol. Br. 10. However, the NGPA provision that withdrew authority from FERC to regulate high-cost gas (§ 601(a)(1)(B)(i), 15 U.S.C.A. § 3431(a)(1)(B)(i), does not "explicitly or implicitly bar[] state regulation."

Finally, DACO would excuse the NGPA's lack of language preempting state regulation by pointing to the NGPA's specific grants of regulatory authority allocated between the federal government and the states in §§ 503(c) and 602(a), 15 U.S.C.A. §§ 3413(c), 3432(a). DACO states that it was that allocation of authority that led this Court to conclude that "Congress' removal of federal authority without mention of an appropriate state regulatory role evidenced Congress' continuing intent to preempt state regulation in this narrow area. *Transcontinental*, 474 U.S. at 422-23." DACO Br. 43. But DACO fails to mention that the EPCA also specifically allocates certain authority between the federal government and the states. 42

U.S.C.A. § 6214(b) (providing presidential authority to require accelerated oil and gas production but also that each state may establish maximum and temporary production rates for non-federal oil and gas producing fields in the state); 42 U.S.C.A. § 6297 (superseding any state regulation as to energy efficiency standards or for disclosure of energy consumption of the products covered by the EPCA when there is an existing federal labeling rule or standard, *except* when the state shows a substantial local need, no burden on interstate commerce and the state's standard is more stringent than the federal standard). Thus, DACO's attempt to so distinguish *Transcontinental* is no distinction at all.

The fact is that the pertinent provision of the NGPA involved in *Transcontinental*, § 601, 15 U.S.C.A. § 3431, did not mention, suggest or imply any more than the pertinent provisions of the EPCA, that state regulation would be preempted because Congress intended market forces to determine prices. [29]

Actually, the claims made by DACO and the Solicitor are almost identical to the views of the Mississippi Supreme Court in *Transcontinental Gas Pipeline Corporation v. State Oil and Gas Board of Mississippi*, 457 So.2d 1298 (Miss. 1984). That court found that since the NGPA removed FERC's jurisdiction over deregulated gas, there was no preemption of Mississippi's ratable-take rule; that since there was no "explicit preemptive language," the state regulation at issue did not conflict with federal law; that the NGPA left no " 'scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it';" that although a decision to forgo regulation has preemptive force and "Congress determined that the national interest would be served

[29]It is interesting to note that the NGPA has a separate provision for the reimposition of price controls by the President, after which his authority to establish said controls expires. § 122, 15 U.S.C.A. § 3332, provides the President authority to reimpose price controls with respect to new natural gas, as defined in § 102(c), 15 U.S.C.A. § 3312(c), but not earlier than July 1, 1985, nor later than June 30, 1987 and shall not remain in effect for a period of more than 18 months. Since new natural gas is also covered by § 601, 15 U.S.C.A. § 3431, which withdrew authority from FERC to regulate both new natural and high-cost gas involved in *Transcontinental*, would DACO also argue that, since the President can no longer reimpose price controls over new natural gas, federal concern has ended with respect to said gas?

in the long run by a different approach, that first sales... should be deregulated," the "Congress in NGPA in 1978 did not ban state regulation of deregulated gas;" that Congress only stripped "away federal regulatory authority, thus leaving in effect...state regulatory authority as otherwise exists;" and that there is no "congressional enactment that wellhead prices of deregulated gas be left unregulated by the states as well." In effect, the Mississippi court required that a decision to deregulate be accompanied by a federal statute explicitly forbidding state regulation. 457 So.2d at 1316-1318.

Such arguments were rejected by this Court. Paraphrasing *Transcontinental*, as applicable herein:

> That [the President] can no longer step in to regulate directly the prices at which [wholesalers sell], however, has little to do with whether state regulations that affect a [wholesaler's] costs and purchasing patterns impermissibly intrude upon federal concerns. [DACO's] action directly undermines Congress' determination that the supply, the demand and the price of [gasoline] be determined by market forces. To the extent that Congress denied [the President] the power to regulate affirmatively particular aspects of [gasoline prices] it did so because it wanted to leave determination of supply and...price to the market.... 88 L.Ed.2d at 744.

In sum, TECA was as correct in finding that "[t]he enactment of the EPCA evidences congressional recognition of the continuing necessity for a strong national policy on energy...[and] that Congress intended to establish a market free of *any* government control other than standby emergency controls," PA 14a, as this Court was in finding that the enactment of the NGPA so as to "give market forces a more significant role in determining the supply, the demand and the price of natural gas...cannot be interpreted as an invitation to the states to impose additional regulations." *Transcontinental*, 88 L.Ed.2d at 744.

VI. *Tully* Did Not Decide Whether the EPAA As Amended By the EPCA Preempts State Regulation After September 30, 1981.

Apparently concerned with the parallelism between *Transcontinental* and this case, DACO misconstrues this Court's decision in *Tully*, 455 U.S. 245. DACO would have *Tully* be an "on-point

holding" that "specifically addressed...the issue of the post-expiration preemptive effect of the EPAA." DACO Br. 12, 14. The Solicitor is more candid, recognizing that *Tully* "had not been briefed on the merits and the effect of the expiration of federal regulatory authority does not appear to have been raised explicitly by the parties." Sol. Br. 14-15 n. 4.

In *Tully*, TECA held that a New York tax anti-passthrough provision conflicted with the EPAA despite the exemption of all petroleum products from price and allocation regulations. 653 F.2d 497. However, TECA warned that it had not done a complete preemption analysis in deciding the appeal.[30] After an appeal to this Court, during which the federal regulatory authority terminated, this Court summarily vacated because "the judgment and injunction are not appropriately framed for this Court to review" and remanded to TECA "for reconsideration in light of the expiration of federal price control authority under the EPAA." 455 U.S. at 249.

DACO and the Solicitor emphasize TECA's *dictum* that "[w]hen the statute expires in September 1981 it will signal the end of federal concern in this area." 653 F.2d at 502; 455 U.S. at 246. However, they fail to adequately explain why, if said language was dispositive of the post-September 30, 1981 preemption issue, this Court remanded the case for TECA to decide, among other things, whether any federal interest remained that would prevent New York from enforcing its law:

> We express no opinion on the ultimate merits of these contentions. We leave to TECA, a court intimately familiar with the intricacies of federal energy regulation, the task of deciding in the first instance what effect, if any, the expiration of federal price authority has on these collateral matters. 455 U.S. at 248.

What DACO and the Solicitor fail to report is that upon remand to

[30] "Judge McCurn found it unnecessary to decide whether Congress had intended that there be exclusive federal control over allocations and pricing of petroleum products, resting his decision on the 'conflict' standard for preemption. We, too, do not reach the 'occupation of the field' question, we find sufficient basis under the conflict standard to exclude the State from exercising the anti-passthrough provision." 653 F.2d at 499.

TECA, plaintiffs immediately addressed the issue of the continuing federal interest in a deregulated petroleum market.[31] Deciding that both parties to the litigation were raising "important controversies remaining which may have federal overtones" but which "were never brought to the attention of this court on the original appeal," TECA "remanded to the district court for whatever action is deemed necessary in the first instance." *Tully*, 689 F.2d at 187.

Upon remand to the district court, plaintiffs moved for summary judgment on the grounds that:

> [I]ndeed, the very fact that regulatory authority no longer exists reflects an affirmative decision by the Executive Branch that the prices of petroleum products shall be the product of an unregulated market, free from all government price controls. Manifestly, this federal policy was not intended to permit state regulation of petroleum prices while denying such authority on the federal level....[32]

[31] In their March 26, 1982 *Memorandum In Support Of Plaintiffs-Appellees' Joint Motion To Modify The Judgment*, they stated:

> Plaintiffs-appellees do not concede that the federal interest in maintaining a market for petroleum products free from state price regulations expired along with presidential rulemaking authority under the EPAA.... When Congress, in 1975, provided for a gradual phase-out of federal price and allocation regulations, it adopted a policy of free-market pricing of petroleum product prices which continues to exist even though the President's regulatory authority under the EPAA has expired....
>
> Nevertheless, we agree with Justice Stevens that this issue is not presented by the State's appeal and is not now before this Court. In this connection, it is noteworthy that the district court has not had an opportunity to address this issue since the expiration of EPAA authority. When it issued its decision in September 1980, one year before that expiration, the district court expressly declined to rule on the matter. *Mobil Oil Corp. v. Tully*, 499 F. Supp. at 888, 909 (N.D.N.Y. 1980). Thus, plaintiffs-appellees intend to raise before the district court the issue of post-September 1981 preemption....

Pages 9-13, *Mobil Oil Corp. v. Tully*, 689 F.2d 186 (TECA 1982) (nos. 2-29, 2-30). Copy of this memorandum is being lodged with the clerk's office of this Court.

[32] October 22, 1982, *Memorandum In Support Of Plaintiffs' Joint Motion For Summary Judgement*, at 10-11, *Mobil Oil Corp. v. Tully*, No. 80-CV-543 (N.D.N.Y.). Copy of this memorandum is being lodged with the clerk's office of this Court.

The case was settled before the district court could rule on preemption and other issues before it.

Finally, neither TECA nor this Court had in *Tully* the benefit of post-1981 legislative and executive actions shedding light on congressional intent and the national policy in this field. In this case, TECA not only did the comprehensive analysis which in *Tully* it acknowledged it had not, but also had the benefit of post-1981 events and this Court's *Transcontinental* decision to guide it in said analysis. TECA acknowledged as much. PA 11a.

VII. It Was Not *Tully* But *Dubno* Which Specifically Addressed and Analyzed the Principles To Be Applied in a Situation Where a Petroleum Product Previously Regulated by the EPAA Is Deregulated.

Amici and the Solicitor totally ignore, and DACO relegates to a footnote, DACO Br. 38 n. 38, an important case in this area, *Mobil Oil Corp. v. Dubno*, where the court conducted a comprehensive preemption analysis of the EPAA's regulatory scheme and the EPCA's subsequent revision of said scheme.

Dubno was an action almost identical to *Tully*, except that the tax was imposed only over products already exempted from federal regulations. In analyzing the EPAA, the *Dubno* court found: "[t]he understanding of Congress [is] that the allocation and pricing of petroleum products is a national problem requiring federal regulation" and not "piecemeal action by the states." 492 F. Supp. at 1007. The *Dubno* court then analyzed the congressional purpose of the EPCA in authorizing the President to exempt petroleum products from the EPAA regulations. The court concluded that the EPAA's exemption from price controls of certain petroleum products was not "intended to permit the states to regulate the price of such products as they saw fit." Rather, " 'exemption' — far from relinquishing petroleum product pricing to state regulation — constitutes an affirmative federal decision that petroleum products should be free from all price regulation, and that EPAA objectives will best be served by an unregulated free market subject only to standby federal controls." 492 F. Supp. at 1013-1014.

The *Dubno* court then explained the adverse results of state intervention with the federal decision to deregulate, pointing to

dislocation, artificial market conditions, supply problems, market distortions and economic inefficiency. These are the same adverse results that Congress shunned when it adopted the policy to deregulate petroleum markets in the EPCA. DACO's regulations directly conflict with said policy "[b]ecause [they] subject[] to price regulation petroleum products that federal authorities have decided should be free of price regulation...." *Dubno*, 492 F. Supp. at 1014.

VIII. Congress Cannot Be Presumed To Have Intended a Chaotic Regulatory Structure. An Inquiry as to Whether Congress Authorized or Contemplated Such Chaos Was Proper.

Whatever presumptions may apply in this area, one thing cannot be easily presumed: that Congress intended a chaotic regulatory structure. *International Paper Co. v. Ouellette*, 479 U.S. __, 93 L.Ed.2d 883, 900 (1987). TECA was concerned in this case that, in the absence of preemption, there could be such chaos, *i.e.*, "fifty individual regulatory schemes operating in the petroleum products markets." PA 13a.

DACO faults TECA's decision as a reversal of "the well established presumption that state law is not preempted absent a clear and manifest intent to preempt" and of the "burden of proof," because TECA focused "the inquiry on 'whether by removing federal price controls Congress intended to allow the States to step in.' " DACO Br. 41, 44-45.

TECA's approach was perfectly legitimate. This Court has often inquired whether federal statutes or regulations contemplate or authorize state regulation. *California Coastal Comm'n v. Granite Rock*, 480 U.S. __, 94 L.Ed.2d 577, 593 (1987); *International Paper Co.*, 93 L.Ed.2d at 897; *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. __, 93 L.Ed.2d 449, 467 n. 19 (1986); *Wardair Canada v. Florida Dept. of Revenue*, 477 U.S. __, 91 L.Ed.2d 1, 9 (1986); *Louisiana Public Service Com. v. F.C.C.*, 476 U.S. __, 90 L.Ed.2d 369 (1986); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 n. 17 (1984); *Pacific Gas & Elec. v. Energy Resources Comm'n*, 461 U.S. 190, 208-210 (1983).

IX. Puerto Rico Is Bound by the Supremacy Clause, Regardless of its Claim to Unique, Local Market Conditions.

DACO wavers between suggesting that traditional preemption

principles do not apply to Puerto Rico and admitting that its actions can be preempted "like that of any state." DACO Br. 17, 46-47.[33]

The Supremacy Clause without doubt is binding on all branches of Puerto Rico's government. As an integral part of the national economy, Puerto Rico must accept uniformity required by federal legislation regulating said economy under the commerce clause. *First Circuit Judicial Conference*, 110 F.R.D. 449, 469, 472-474 (1985). It is unthinkable that there be under the American flag a governmental authority untrammelled by the Supremacy Clause. *Cf. Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 668 n. 5 (1974); *Sea-Land Services, Inc. v. Municipality of San Juan*, 505 F. Supp. 533, 539-545 (D.P.R. 1980).

In order to be exempt from the application of the Supremacy Clause in this area, Puerto Rico would have to show that such an exemption was the will of Congress. *Torres v. Puerto Rico*, 442 U.S. 465 (1979).[34] The fact of the matter is that Congress extended full coverage of the EPAA and the EPCA to Puerto Rico. 15 U.S.C.A. § 752(7) and 42 U.S.C.A. § 6202(4).

DACO's characterizations of the Puerto Rico market, Br. 47, as shown above, find no support in and contradict the record. If preemption were to depend on a particular state's claim to its own "unique market conditions," the United States would revert to economic Balkanization, as was the situation under the Articles of Confederation, and, of course, there would be no preemption and also no national economy. It is simply too late in the day to even suggest this. As stated in *Torres*, 442 U.S. at 474, if Alaska and

[33] At p. 3 of its petition for rehearing and suggestion for rehearing *en banc* filed before TECA, DACO admitted that notwithstanding Puerto Rico's "unique Commonwealth status within the federal system, the Supremacy Clause is fully applicable to Puerto Rico as though it were a state." Some amici tell us that "for purposes of applying preemption principles, the Commonwealth of Puerto Rico is treated as a State." Nat. Br. 6 n. 4.

[34] The language in *Torres* is particularly appropriate here:

> Puerto Rico's law enforcement needs are indistinguishable from those of many states. Puerto Rico is not unique because it is an island; like Puerto Rico, neither Alaska nor Hawaii are contiguous to the continental body of the United States. Moreover, the majority of all the states have borders which coincide in part with the international frontier of the United States; virtually all have international airport facilities subject to federal customs controls. 442 U.S. at 474.

Hawaii cannot claim a special exemption from constitutional strictures, neither can Puerto Rico. Furthermore, if preemption is going to hinge upon a state's claim to unique local market conditions, as DACO apparently claims here, Br. 46-47, then what would really "expire" would be the Supremacy Clause, because each of the states, in one way or another, can make some sort of plausible claim that its "economy is significantly different from that of other jurisdictions" and then be exempted from the application of the Supremacy Clause because that state's "economic solutions may lie in the application of [economic] theories inappropriate at the national level." Nat. Br. 8.[35]

X. The Concerns of the *Amici* Are Unfounded.

DACO wavers as to the specific impact of this case. In its April 21, 1987 reply brief in support of its petition for certiorari, DACO claimed that "the impact of TECA's holding is not limited to Puerto Rico" and argued that "the National Association of Energy Officials' concerns is not of hypothetical invalidation of statutes not yet enacted, but of the invalidation of the scores of statutes that are already on the books." DACO repeats this theme in its brief, p. 3, claiming that the "issue here is whether Congress has forbidden all states and other local jurisdictions from regulating local petroleum prices." DACO then contradicts itself by stating at pp. 28 n. 27, 46 n. 44 and 47 of its brief that there really are not "scores of statutes" and not "all" states are affected by TECA's decision, because "most states did not regulate petroleum prices before the EPAA and have not attempted to institute such regulations since that time. In practical effect the market has been 'largely unregulated' except during the period of federal controls;" because "only Puerto Rico appears presently to regulate prices ;" and because "most states traditionally have not instituted such regulations. No conflicting web of regulations existed prior to the enactment of the EPAA in 1973 and none has arisen since the expiration of the EPAA in 1981." This conclusion follows: the states' exercise of their "traditional police powers,"

[35] Mississippi would not have to heed the Supremacy Clause because its per capita income is the lowest of any state. *Id.* at 14. Also Louisiana because of its high unemployment rate. *Id.* Thereafter, states with trade deficits and states that do not produce oil or consume more gasoline than what they refine.

DACO Br. 18, has been, and continues to be, before 1973 and after 1981, a *non*-exercise, leaving the market unregulated.[36]

If, as DACO claims,[37] the intent of Congress was to "return" to the status quo *ante* 1973, then said intent was to "return" to a "largely unregulated" market and a state of affairs where the states "did not regulate petroleum prices," as a matter of "tradition." Congress wished to "return" to a state of non-regulation by the states and DACO's regulatory orders contradict the wishes of Congress.

Various states have appeared herein as *amici* in support of DACO. They express a concern that TECA's decision may prevent the enforcement of certain of their statutes. Also, the National Association of State Energy Officials ("NASEO") expresses concern that TECA's decision may "severely hamper the ability of states to address local, regional or national energy disruptions." New York *Amicus* Br. 2.

These concerns are unfounded. As to the concerns of NASEO, as shown above, "District Court Proceedings," the trial court's decision, affirmed by TECA, does not "hamper" at all the states' ability to address local or regional energy disruptions. The EEPA expressly contemplates this, as both the trial court and TECA held. SA 80-82; PA 16a-17a.

Some *amici* states do not specify which of their particular statutes are affected by TECA's decision. These states are Maryland, Mississippi, Oregon and Pennsylvania (and presumably all other state governments. *See* Nat. Br.). These states' concerns are abstract and hypothetical in the absence of a showing of which particular state statute is affected by TECA's decision.[38] As such they should not be addressed here.

[36]In this sense, the concern of the TECA dissent, PA 26a, repeated by DACO here, Br. 46 n. 44, of a continuing problem for the federal judiciary due to the precedential value of this case, is unfounded. Since before 1973 and after 1981 the states have decided not to regulate, there should not be a flood of federal court lawsuits, where jurisdiction is limited to actual cases and controversies. To date, this case has generated no progeny and we know of no ongoing litigation based on this case. To this one must add that the trial court, affirmed by TECA, held large areas of state regulation not to be preempeted, making federal court litigation even more unlikely.

[37]Some *amici* repeat this claim. Nat. Br. 19.

[38]*Ashwander*, 297 U.S. at 341-356 (1936)(Brandeis, dissenting).

The remaining four states that point to particular statutes need not be concerned. Their statutes are of the types found by the trial court not to be preempted, SA 85-86, and TECA affirmed said ruling. PA 18a.[39]

[39]Conn. Gen. Stat. Ann. § 21a-78a (West 1987) (a major disaster or emergency statute); N.J. Stat. Ann. 56:6-2 (West 1987) (a consumer education, fair trade and antitrust statute); N.Y. Gen. Bus. Law § 396-r (McKinney 1984) (an emergency statute); Me. Rev. Stat. Ann. Title 10, § 1105 (1980) (a conservation, fair trade and antitrust statute). Admittedly, one clause in the Maine statute seems to proscribe "any unjust or unreasonable profit in the sale, exchange or handling" of "a necessity of life," which includes "fuels of all kinds." It is doubtful that this statute, being criminal in nature, could withstand attack on vagueness grounds, *U.S. v. Cohen Grocery Co.*, 255 U.S. 81 (1921), and companion cases (255 U.S. 98, 100, 102, 104, 106, 108 and 109), because a merchant in Maine has no idea in advance of what an "unjust or unreasonable profit" would be, *U.S. v. Powell*, 423 U.S. 87, 92-93 (1975).

CONCLUSION

For the foregoing reasons, TECA's decision should be affirmed, as appearing respondents hereby very respectfully request.

Respectfully submitted,

Igor Domínguez
WILLIAM ESTRELLA
LAW OFFICES
Counsel for Texaco
Puerto Rico, Inc.
P.O. Box S-4826
San Juan, Puerto Rico 00905
(809) 721-7481

Rafael Pérez-Bachs*
Néstor M. Méndez-Gómez
Ana Matilde Nin
Arturo J. García-Solá
McCONNELL VALDES KELLEY
SIFRE GRIGGS & RUIZ-SURIA
Counsel for The Shell Company
(Puerto Rico) Limited,
Mobil Oil Caribe, Inc., and
Phillips Puerto Rico Core, Inc.
G.P.O. Box 4225
San Juan, Puerto Rico 00936
(809) 759-9292

Alvaro R. Calderón, Jr.
Counsel for Isla Petroleum
Corp. and Gasolinas de
Puerto Rico Corp.
P.O. Box 2219
Hato Rey, Puerto Rico 00919
(809) 753-5050

Carlos F. López
Celso E. López
Counsel for Cía. Petrolera
Caribe, Inc.
P.O. Box 8852
Santurce, Puerto Rico 00910
(809) 721-5037

*Counsel of Record

Dated: January 11, 1988
San Juan, Puerto Rico

REPLY

BRIEF

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,
Petitioners,

v.

ISLA PETROLEUM CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the Temporary Emergency Court of Appeals

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REPLY BRIEF FOR THE PETITIONERS

LYNN R. COLEMAN *
DOUGLAS G. ROBINSON
MATTHEW W. S. ESTES
KAREN L. MCDONALD
SKADDEN, ARPS, SLATE,
MEACHER & FLOM
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

HECTOR RIVERA CRUZ
Secretary of Justice
Commonwealth of
Puerto Rico

MARCOS A. RAMIREZ IRIZARRY
DENNIS A. SIMONPIETRI MONEFELDT
RAMIREZ & RAMIREZ
117 Eleanor Roosevelt Avenue
Hato Rey, Puerto Rico 00918
(809) 758-5660

RAFAEL ORTIZ CARRION
Solicitor General
Commonwealth of
Puerto Rico

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR THE PETITIONERS

ARGUMENT

The Respondents [1] and the *Amici* supporting them have submitted five briefs to this Court urging the affirmance of TECA's decision below. Though a wide array of arguments has been advanced by these parties in support of affirmance, each brief is at bottom dependent upon the same flawed premise. Each of the Respondents has asserted that Congress enacted EPCA for the purpose of establishing petroleum markets totally free of *both* federal and state regulation subsequent to the expiration of federal regulatory authority in 1981. Acceptance of that contention is crucial to all of the remaining arguments of the Respondents.

It is clear from the language and legislative history of EPCA that Congress intended to phase out gradually, and eventually to terminate entirely, all federal controls. The Respondents are unable to demonstrate, however, any congressional intent whatsoever to prohibit the states' option to regulate petroleum product prices at the local level. In fact, what evidence there is of congressional intent suggests that Congress contemplated a return to a marketplace where the states retained their historic authority to regulate prices at the local level. Without compelling evidence in the EPAA, EPCA, other energy legislation or their respective legislative histories that Congress intended to create a petroleum market free of

---

[1] For ease of reference, the Respondents and the *Amici* supporting them hereinafter are referred to collectively as "Respondents." The individual parties or groups of parties that filed separate briefs are referred to herein as follows: Esso Standard Oil Co. (PR) and Caribbean Gulf Refining Corporation ("Esso"); Isla Petroleum Corp., Gasolinas de Puerto Rico Corp., Cia. Petrolera Caribe, Inc., Texaco Puerto Rico, Inc., The Shell Company (Puerto Rico) Limited, Mobil Oil Caribe, Inc. and Phillips Puerto Rico Core, Inc. ("Shell"); American Petroleum Institute ("API"); Petroleum Marketers Association of America ("PMAA"); and the New England Fuel Institute ("Fuel Institute").

regulation at all levels of government, all the arguments of the Respondents fall.[2]

I. In This Case, the Respondents Cannot Avoid Having to Show a Congressional Intent to Preclude State Regulation.

Both TECA and the Respondents rest their claim of preemption on the theory that Puerto Rico's regulation of local petroleum markets "stands as an obstacle to the accomplishment . . . of the full purposes and objectives on Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Pet. Ap. at 17a; Esso Br. at 13; Shell Br. at 15. They go on to argue that under the *Hines* branch of preemption, there does not have to be a clearly expressed intent by Congress to preempt state law, or even evidence that Congress thought about the preemption issue, provided the challenged state regulation clearly conflicts with a congressional purpose. *See, e.g.*, Esso Br. at 13. The Respondents seek to rely on the *Hines* doctrine to overcome the lack of any evidence that Congress specifically intended to preempt all state regulation of petroleum prices and allocation.

The Respondents, however, have stretched the *Hines* branch of conflict preemption beyond its limits in their attempt to apply it to this case. Even if, in some cases, there does not have to be a showing of specific congressional intent to preempt state law, there must, at a minimum, be a clear "substantive" congressional purpose with which state law is said to conflict. *Compare Perez v. Campbell*, 402 U.S. 637 (1971) (state law suspending drivers' licenses for nonpayment of judgments conflicts with clearly established substantive purpose of the federal bankruptcy act) *with Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) (federal statutes encouraging the use of coal do not create a clearly established

[2] Some of the Respondents also question the wisdom of Puerto Rico's regulations. Shell Br. at 2-7. This issue is, of course, irrelevant to the issue before this Court, and Petitioners therefore will not address it.

congressional purpose with which state severance tax on coal conflicts). Here, the Respondents are improperly attempting to use the *Hines* doctrine to excuse themselves from showing *either* a clear intent to preempt state law *or* a clear substantive federal purpose with which state law would inherently conflict.

In this case, the issue is such that there is no meaningful distinction between a showing of specific congressional intent to preempt and a showing of a clear substantive congressional purpose with which state law necessarily conflicts. That is because the only substantive purpose that is alleged to remain after the regulatory features of the EPAA expired is nothing more than creation of a "totaly unregulated" petroleum market, by which the Respondents mean a petroleum market free from regulation at all levels of government. Thus, even under the *Hines* doctrine the Respondents must show that Congress intended to preclude *both* state and federal regulation after the EPAA expired.[3]

There is no evidence, either in the relevant federal statutes or in their legislative histories, that Congress intended to withdraw from the states the ability to respond to local conditions in petroleum markets after the EPAA expired. To the contrary, as shown below, Congress said nothing at all about that subject at the time of enactment of the EPAA or the EPCA amendments. When Congress did address the subject explicitly at the time of the EPAA's expiration and thereafter, it indicated in the clearest possible terms that there would be no post-expiration preemption in the absence of additional legislation—which was proposed but never became law. *See* DACO Br. at 29-37. In consequence, the Respondents' attack on Puerto Rico's exercise of its traditional police powers must fail.

[3] A congressional purpose to eliminate federal controls is of course obvious from the statute itself. EPAA § 18, 15 U.S.C. § 760g (1982). The Respondents' difficult burden is to show that, in the absence of any such statutory provision, Congress had a similar intent with regard to state regulation.

II. Congress Never Has Expressed an Intent to Create a Petroleum Market Free of All Forms of State Price Regulation.

A. Nothing in the Language of the Statute Itself Remotely Suggests a Congressional Purpose to Preempt State Regulation After the EPAA Expired.

Statutory language is, of course, the first place the Court looks to determine congressional purpose and intent. *See, e.g., Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740 (1985); *Michigan Canners and Freezers Ass'n v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 470 (1984). Conspicuously absent from the briefs of the Respondents is any argument based upon the language of the EPAA or the EPCA amendments. That is not surprising; there remains in effect no statutory provision with which Puerto Rico's regulations may be said to conflict.

While the EPAA was in force, state regulation that conflicted with a federal regulation issued under the Act was explicitly preempted under Section 6(b).[4] Section 18 of the EPAA, as amended by EPCA, provided for termination on September 30, 1981 of the presidential authority to "promulgate, make effective or amend" such regulations.[5] With the termination of this authority, any possibility of conflict with the statutory scheme was eliminated. That is because the expiration provision of the EPAA left the area of petroleum price and allocation regulation almost totally unoccupied at the federal level. The Petitioners have been unable to find any case that has come before this Court under the Supremacy Clause where less possibility of conflict appeared on the face of the relevant federal and state enactments than is the case here.

The absence of any provision in the EPCA amendments themselves for post-expiration preemption is highly suggestive of a lack of congressional intent to preempt, especially

[4] 15 U.S.C. § 755(b) (1982).

[5] 15 U.S.C. § 760g (1982).

given the care with which Congress addressed other issues in EPCA. EPCA was quite explicit as to how the petroleum industry was to be regulated *prior* to September 30, 1981. Not only did the statute spell out many of the required features of the federal regulations,[6] but it also provided in detail the mechanism for gradual decontrol.[7] It was also quite specific in stating that there would be no *federal* regulation after September 30, 1981. It is difficult to imagine that a Congress that dealt so explicitly with the nature of petroleum industry regulation for the period before September 30, 1981, and with the removal of a federal presence after that date, would be so careless as to not even mention in the statute its desire to create for the petroleum industry a far-reaching immunity from state regulation as well. Such a major oversight cannot be presumed.

B. The Legislative History of the EPAA and EPCA Does Not Reveal a Congressional Intent to Rely upon a Totally Deregulated Market.

Notwithstanding that they can cite to no specific legislative enactment, the Respondents nevertheless claim that a congressional intent to foreclose both federal and state regulation is "clear" and "obvious."[8] That assertion is

[6] *See, e.g.*, EPCA §§ 401 (specifying, *inter alia*, a ceiling on average crude oil prices, the method for escalation of those prices and the method by which price decreases are to be passed through at subsequent levels of distribution), 402 (restricting the amount of costs that can be accumulated and passed through in each month) and 403 (prescribing details regarding the manner in which costs are to be shared among refiners in the "entitlements program"), 15 U.S.C. §§ 757, 753(b) and 753(e). This level of detail is in contrast to the original EPAA enacted in 1973, which imposed only broadly defined limits on the President's authority. *See, e.g.*, EPAA Section 4, 87 Stat. 628, 629 (1973).

[7] *See, e.g.*, EPCA § 455 (providing the mechanism by which the President could convert the regulations to standby authority), 15 U.S.C. § 760a.

[8] *See, e.g.*, Esso Br. at 36; Shell Br. at 21; Fuel Institute Br. at 21; PMAA Br. at 11; API Br. at 13.

dependent on certain isolated excerpts from the conference report that accompanied the EPCA amendments. A full examination of that legislative history, however, shows anything but "clear" and "obvious" support for the Respondents' position. The legislative history does not in fact address the subject of state preemption at all, either explicitly or inferentially.

There are only two references in the EPCA Conference Report to an "unregulated" market after expiration of the EPAA authority. *See* DACO Br. at 26-29. Neither reference occurs in a discussion of what Congress intended to be the status of state regulation after termination of federal controls—there is no such discussion in the entire legislative history—but instead is merely a shorthand description of the market once *federal* controls are removed.[9] The first such reference is as follows:

> In many ways, the supply side of the market has returned to near the pre-embargo conditions which prevailed in 1972.
>
> In view of these changed conditions, a comprehensive regulatory scope outlined above may no longer be necessary. On the other hand, to allow such a comprehensive structure to expire, overnight, may itself create severe dislocations. To the extent that mandatory controls are no longer needed or desirable, a gradual return to an unregulated market is preferable to sudden decontrol.

S. Conf. Rep. No. 516, 94th Cong., 1st Sess. 203, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1956, 2045 (hereinafter referred to as "EPCA Conference Report"). In this context, "return to an unregulated market" does not indicate any intent by Congress to deny to

[9] In that part of the EPCA Conference Report that discusses the goals of the statute and the methods by which those goals were to be achieved, there is no reference whatsoever to reliance upon a free, unregulated or deregulated market. S. Conf. Rep. No. 516, 94th Cong., 1st Sess. 116-22, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1956, 1957-62.

the states their traditional police power to make local policy choices. If anything, the words are strongly suggestive of a congressional intent to return to the pre-embargo conditions of 1972, when state regulation indisputably was not preempted.

The second reference to an unregulated market in the EPCA Conference Report, appearing shortly after the first, reads as follows:

> Extension of the EPAA and its conversion to a standby authority offers, in addition, the potential for a smooth transition of petroleum markets from a closely regulated state to a large [sic] unregulated status subject to standby pricing and allocation authority.

EPCA Conference Report at 204, *reprinted in* 1975 U.S. Code Cong. & Admin. News at 2045.[10] Here again, the context was a discussion of the advantages of a smooth transition from federal controls. Moreover, the language Congress used in the quoted sentence to refer to the post-EPAA market—"large[ly] unregulated"—is entirely descriptive of the status of petroleum markets as they existed prior to 1973. *See* DACO Br. at 28.

In assessing these references to an unregulated market in the EPCA Conference Report, it is important to keep in mind the conditions under which Title IV of EPCA was enacted. The "going in" positions of the conference participants who drafted the statute ranged from that of the President, who initially urged immediate decontrol,[11]

[10] This language is arguably beside the point, because the reference to standby pricing and allocation authority indicates that the conferees were speaking of the time period *prior* to the expiration of the EPAA but after the President had exercised his discretion to terminate some or all federal controls—a period when presidential authority would remain intact but the federal regulations would be in a standby status.

[11] As among the Executive and the two Houses of Congress, President Ford was the strongest advocate of an "unregulated" marketplace. His proposed "Energy Independence Act of 1975," considered too extreme by both the House and the Senate, provided for immedi-

to that of the House, which had passed a bill opting for permanent federal regulation. H.R. Rep. No. 340, 94th Cong., 1st Sess. 1, 7, 58, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1762, 1769, 1820. The conference, which lasted 5 weeks, 121 Cong. Rec. S41,200 (1975) (statement of Senator Jackson), resulted in a carefully drawn compromise that became Title IV of EPCA. Under these circumstances, when practically every word of the conference substitute was painstakingly and precisely written, it would be especially inappropriate to attempt to read anything between the lines of the words used by the conferees. *See Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 374 (1986) ("[T]he final language of . . . legislation may reflect hard-fought compromises. Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.").

The other excerpts from the legislative history upon which the Respondents rely are taken from statements made by President Ford or by the House Committee on Interstate and Foreign Commerce before the conference committee negotiations caused them to compromise the positions they had advocated earlier in those statements.[12]

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ate decontrol by simply allowing the EPAA to expire on its original expiration date of February 28, 1975. *See Economic Impact of President Ford's Energy Program: Hearings Before the Senate Committee on Interior and Insular Affairs*, 94th Cong., 1st Sess. 380-447 (1975). Ironically, had President Ford's extreme original position been adopted, the Respondents would be without any argument at all that there is state law preemption, for they are relying on nothing in the original EPAA or its legislative history to suggest an intent at that time to preempt state law after the EPAA's expiration. The Respondents have not explained how state law preemption could have emerged from the EPCA negotiations when not even the most extreme advocate of a return to an "unregulated" petroleum market advocated such a position going into the negotiations.

[12] *See, e.g.*, Esso Br. at 31 ("[t]he 'only practical and effective way to achieve energy independence', the President argued, was to remove controls so that the 'price mechanism' could operate freely in the marketplace.") (quoting 11 Weekly Comp. Pres. Doc. 145 (Feb. 4, 1975)); Shell Br. at 20-21 ("The Arab embargo . . . underscored more effectively than could any other event the need for policy decisions at the national level.") (quoting H.R. Rep. No. 340, 94th Cong., 1st Sess. 1, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1762, 1763).

Even these statements, however, provide no indication that their authors had in mind the preemption of state law once federal controls expired.

Thus, EPCA's legislative history is no more supportive of the Respondents' position than is the statutory language itself. Both are devoid of any indication that Congress' purpose was to preclude state regulation of petroleum prices at the local level. The most that can be said about congressional intent from the legislative history is that Congress desired a return to the "unregulated" marketplace that existed before state police powers were preempted by complex and pervasive emergency price and allocation regulations imposed at the federal level.

C. Preemption Cannot Be Based on a General "Federal Policy."

Lacking any specific language in either the statute or its legislative history that would indicate a congressional intent to preempt state law after federal decontrol, the Respondents have expanded their search for preemptive authority. To this end, they have bundled together the other titles of EPCA, along with a potpourri of post-EPCA statutes, Executive statements and reports and other miscellaneous occurrences, from which they then infer a comprehensive "national energy policy" that supposedly forbids all state regulation of petroleum prices. Shell Br. at 23-36; Fuel Institute Br. at 28-48; PMAA Br. at 8-11. Aside from substantially overstating the existence and nature of such a policy,[13] this argument is

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[13] EPCA, while dealing with a number of petroleum-related subjects, cannot fairly be said to have established a comprehensive,

strikingly similar to the "national policy" arguments rejected by this Court in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) and *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981).

In *Exxon*, the plaintiff oil companies argued that a state regulation prohibiting the selective granting of "voluntary allowances" to gasoline retailers was preempted by the antitrust laws and by a broad national policy favoring free competition. The Court rejected this argument, noting that the "teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists." 437 U.S. at 130 (quoting *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960)).

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long-range national energy policy. Nor can it fairly be said that a commitment to the free market was its fundamental purpose. To the contrary, the other titles of EPCA involved many new forms of regulation. After the EPCA amendments, the Executive and Congress both continued to bemoan the lack of a comprehensive national energy policy. Indeed, the lack of such a policy was a primary impetus for the passage of subsequent legislation such as the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1975), *see* S. Rep. No. 164, 95th Cong., 1st Sess. 4-5, *reprinted* in 1977 U.S. Code Cong. & Admin. News 854, 858 ("This Nation critically needs comprehensive, balanced national energy policies to guide the public and private sectors in working together to put energy supply and demand back into balance—both now and for years ahead."); the National Energy Act, Pub. L. Nos. 95-617 - 95-620, 92 Stat. 3117, 3174, 3206, 3289; *see* H.R. Rep. No. 543, 95th Cong., 2d Sess. 8, *reprinted in* 1978 U.S. Code Cong. and Admin. News 7673, 7677 ("The National Energy Act represents an effort to adopt a comprehensive set of policies which will allow the U.S. economy the time to make an orderly transition to an era of expensive energy resources, in particular oil and gas resources, from a past characterized by very inexpensive energy resources."); and the Energy Security Act of 1980, Pub. L. No. 96-294, 94 Stat. 611 (1980); *see* S. Rep. No. 387, 96th Cong., 2d Sess. 6, *reprinted in* 1980 U.S. Code Cong. & Admin. News 1751, 1756 (discussing the need for "a balanced energy program" to reduce import dependency). Nothing in these statutes indicates the existence of a national energy policy that includes reliance upon petroleum markets free from both federal and state regulation.

In *Commonwealth Edison*, the plaintiffs argued that a state coal severance tax, which significantly increased the cost of coal to the consumer, was preempted by several statutes, including EPCA, that were designed to encourage greater use of coal. The plaintiffs asserted, much like the Respondents do here, that the Montana tax "frustrate[d] national energy policies" reflected in those statutes. 453 U.S. at 633. The Court refused to rely upon such general expressions of policy to preempt state law:

> As we have frequently indicated, "[p]re-emption of state law by federal statute or regulation is not favored 'in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.'" In cases such as this, it is necessary to look beyond general expressions of "national policy" to specific federal statutes with which the state law is claimed to conflict.

Id. at 634 (citations omitted).[14]

The other Titles of EPCA and the other post-EPAA legislative enactments referred to by the Respondents reveal no such conflict. Title I of EPCA relates to increasing domestic energy supplies and creates a Strategic Petroleum Reserve.[15] Title II provides for participation in the International Energy Program and for emergency conservation and rationing programs.[16] Title III deals with energy conservation,[17] and Title V includes only administrative provisions of general applicability to the

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[14] Although there was a divided Court on other issues in this case, the dissent agreed that the preemption claim was without merit. *See* 453 U.S. at 653 n.21 (Blackmun, J., dissenting).

[15] 42 U.S.C. §§ 6211-6247 (1982).

[16] 42 U.S.C. §§ 6261-6282 (1982). The emergency conservation and rationing authority expired at the same time as the EPAA. 42 U.S.C. § 6263(f).

[17] 42 U.S.C. §§ 6291-6373 (1982).

other titles.[18] No Respondent has identified any direct conflict with any provision of any of these titles.[19]

Nor do any of the other statutes cited by the Respondents conflict with Pureto Rico's regulations. The Department of Energy Organization Act,[20] which created the Department of Energy, recites the need for a national energy program without providing any indication that such a program includes the preemption of state regulation. This, too, is exactly the type of general policy statement that this Court found in *Commonwealth Edison* to have no preemptive effect. The Crude Oil Windfall Profits Tax Act of 1980[21] cannot, as the Fuel Institute argues,[22] have a preemptive effect on state petroleum regulation simply because it imposed a tax on crude oil prices.

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[18] 42 U.S.C. §§ 6381-6422 (1982). Title V also contains a preemption section. That provision states affirmatively that no state law is superseded by Titles I and II of EPCA unless there is an actual conflict with a provision of or a regulation or order issued under those titles. EPCA Section 526, 42 U.S.C. § 6396. Thus, the Respondents' argument is inconsistent with the manner in which Congress dealt explicitly with the preemptive effect of those titles.

[19] The Fuel Institute argues that Puerto Rico's regulations conflict with 42 U.S.C. § 6241(e), which gives the Department of Energy the authority to provide for the allocation and price control of crude oil withdrawn from the Strategic Petroleum Reserve. Fuel Institute Br. at 22-23. The possibility of Puerto Rico's regulations conflicting with such regulation is remote, since no oil from the Reserve has been withdrawn except for testing purposes, and none is likely to be withdrawn except in the event of a severe national emergency. *See* EPCA § 161(d), 42 U.S.C. § 6241(d) (no drawdown or distribution of the Reserve shall occur unless the President has found that there is "a severe energy supply interruption" or that he is required to do so under the International Energy Program.) Thus, the Strategic Petroleum Reserve authority represents what this Court termed in *Exxon* as the "sort of hypothetical conflict [that] is not sufficient to warrant preemption." 437 U.S. at 131.

[20] Pub. L. No. 95-91, 91 Stat. 565 (1977) (codified as amended at 42 U.S.C. §§ 7101-7375 (1982 and Supp. 1985)).

[21] Pub. L. No. 96-223, 94 Stat. 229 (1980).

[22] Fuel Institute Br. at 39-44.

That Act does not guarantee free market prices for crude oil producers, but, even if it did, any connection between domestic crude oil prices and the local gasoline price regulation imposed by Puerto Rico is far too remote to form the basis for federal preemption. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. at 131. The Energy Emergency Preparedness Act of 1982,[23] also relied on by some Respondents, specifically disclaims the preemption of any state law or regulation. 42 U.S.C. § 6282(c)(2). Finally, although the Standby Petroleum Allocation Act of 1982 (the "SPAA")[24] did specifically evidence congressional intent to preempt state regulation, it was never enacted into law. *See* DACO Br. at 32-34. As a result, the fairest reading of the SPAA and its legislative history is that it represents a congressional acknowledgement in 1982 that the expired EPAA, as amended by EPCA, does *not* preempt state petroleum regulation. *See id.* at 34.

The Respondents also quote general policy statements of the current Administration to support the existence of a "national policy" with which Puerto Rico's regulations are said to conflict. There can be little doubt that general policy statements of the Executive do not constitute the type of "law" contemplated by the Supremacy Clause.[25] But, even if they did, the Respondents' argument would be self-defeating here. Whatever may be the Administration's views on the merits of reliance on market forces, the Solicitor General has filed a brief in this proceeding setting forth the Administration's position that state petroleum price regulation is not preempted by

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[23] Pub. L. No. 97-229, 96 Stat. 248 (1982) (codified in scattered sections of 42 U.S.C.).

[24] S. 1503, 97th Cong., 2d Sess., 128 Cong. Rec. H409 (daily ed. Feb. 22, 1982).

[25] Although regulations duly promulgated may preempt state law, *see, e.g., Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-54 (1982), this Court has never suggested that executive policy statements that do not have the force of law should be accorded preemptive effect.

any federal law.[26] This position is shared by the Department of Energy,[27] which made several of the statements upon which the Respondents rely. Esso Br. at 42 n.15; Shell Br. at 33-36.

D. What Is "Inconceivable" Is that Congress Would Have Left Preemption of State Regulation to Inference.

The principal argument advanced by TECA in support of preemption is that "[i]t is inconceivable that Congress would implement such an extensive and carefully orchestrated termination of federal intervention with the intention that the states step in to regulate the same subject matter as soon as all federal intervention ceased." Pet. Ap. at 13a. This "inconceivability" argument is embraced by the Respondents in their arguments to this Court. Esso Br. at 27-29; Shell Br. at 21-22.

That Congress may not have wanted the states to step in and replicate the full panoply of federal regulations is quite conceivable. But there is no reason whatsoever to believe that Congress had any fear that the states would assume such an aggressive stance. This Court should not presume that Congress was legislating to address a concern that it never articulated. *See TVA v. Hill*, 437 U.S. 153, 185 (1978).

Prior to the enactment of the EPAA, apparently only Puerto Rico saw a need to regulate the prices of petroleum products at the local level. *See* DACO Br. at 28

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[26] Contrary to the suggestion of Esso, Esso Br. at 24-25, the Solicitor General is not reversing the Administration's previous legal position in order to implement the suggestions of the Working Group on Federalism. Whenever the Administration has specifically addressed the issue, it has stated its belief that state petroleum regulation is not and should not be preempted. The Administration's stated position on preemption provisions in post-EPAA legislation is discussed at pages 32-37 of the Petitioner's brief.

[27] Letter from Eric J. Fygi, Acting General Counsel, Department of Energy, to Senator Don Nickles (Dec. 31, 1987), lodged with the Court by Respondent Esso on January 11, 1988.

n.27. Congress could very well have presumed that a similar situation would prevail once federal controls expired, particularly if the federal controls were removed gradually as market forces returned to normal. Thus, it is entirely conceivable that Congress saw no need to preempt state authority in the post-expiration period.

What is inconceivable, however, is that Congress would legislate a heavy-handed restriction on state police powers without some clear words to that effect in either the statute or the legislative history and without any debate on the subject. The Respondents' argument is that Congress exempted an entire industry and all of the essential products it produces from all regulation, at all levels of government, that could be said to interfere with a "completely free market." Our research has revealed not a single instance in the Nation's history where Congress has provided, either implicitly or explicitly, any other industry with such blanket immunity from regulation. Given the wide differences of opinion held by the various EPCA conferees, the precision with which they expressed the terms of their compromise and the care with which federalism issues have been addressed in other energy legislation,[28] it defies belief that a majority of the Congress intended to achieve such an important result in such an obscure manner.

E. There Is a Fundamental Difference Between Preemption While Standby Controls Were Still in Place Under the EPAA and Preemption After the EPAA Expired.

The Respondents note TECA's ruling in *Mobil Oil Corp. v. Tully*, 653 F.2d 497 (TECA 1981), *vacated*, 455 U.S. 245 (1982), that state regulation of petroleum products was preempted during the period that the products

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[28] For example, post-EPAA legislative proposals that would have preempted state law were vigorously debated. For a detailed discussion of these proposals and the failure of Congress to enact them, see DACO Br. at 32-34, 37.

had been exempted by the President from federal regulation but before standby control authority expired on September 30, 1981. They attempt to argue that it would be incongruous to hold that state regulation of exempted products was preempted during this period but not after the termination of standby authority. Esso Br. at 29.[29]

There is no incongruity. In *Tully*, TECA found that the state regulation conflicted with the still effective statutory scheme embodied in the EPAA and Title IV of EPCA because the President still had authority to reinstitute controls. 653 F.2d at 500, 502. TECA also found, however, that "[w]hen the statute expires in September 1981, it will signal the end of federal concern in this area." *Id.* at 502. It was exactly because federal concern had terminated that this Court vacated the permanent injunction against New York's regulation. *Tully v. Mobil Oil Corp.*, 455 U.S. 245, 247 (1982).[30]

Thus, both this Court's and TECA's decisions in *Tully* contain the complete explanation as to why a finding that state regulation is not preempted subsequent to September 30, 1981 is not incongruous with preemption before that date: it was on that date that the federal interest in petroleum price and allocation regulation ended.

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[29] The Petitioners do not concede, as the Respondents assert (Esso Br. at 29; Shell Br. at 22), the validity of TECA's holding that state regulation was preempted during the period when federal regulations were in a standby status. That aspect of TECA's holding was not ruled on by this Court.

[30] Respondents assert that this aspect of this Court's decision in *Tully* is *dicta*, in part because the issue was never briefed. Esso Br. at 46 n.18, Shell Br. at 42-43. This Court did, however, invite briefs on the effect of the expiration of the EPAA on the *Tully* case. *See* Pet. Ap. at 67a. Thus, if that aspect of the issue now before the Court was decided without briefing, it is because no party chose to make the argument the Respondents are making now. That failure could easily have been because no party believed at the time that the argument had any merit. The *Tully* decision is discussed in more detail in DACO Br. at 37-40.

III. The Holding in *Transcontinental* Does Not Require Preemption in This Case.

All of the Respondents urge the Court to accept TECA's conclusion that this case is governed by the result reached in *Transcontinental Gas Pipeline Corp. v. State Oil and Gas Board*, 474 U.S. 409 (1986). *See* Esso Br. at 21-25; Shell Br. at 37-41; Fuel Institute Br. at 49-56; PMAA Br. at 14-16; API Br. at 10-11. The Respondents cite to *Transcontinental* as standing for the proposition that if "Congress deregulates because it has decided that federal goals can best be met by giving market forces free reign, state laws that interfere with market forces 'undermine' the legislative purpose and are consequently preempted under the Supremacy Clause." Esso Br. at 22. Because Respondents assert that Congress decided, in enacting EPCA, that federal goals can best be met by giving market forces free reign, they conclude that petroleum regulation such as that enacted by Puerto Rico is preempted.

The legislation subject to this Court's analysis in *Transcontinental*, the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301-3432 (1982), is similar to EPCA only in the general sense that they both instituted some degree of "deregulation." As DACO pointed out in its initial brief, however, the nature and extent of that deregulation (and the scope of the federal regulatory interest that remains) in each statute are so entirely dissimilar that this Court's finding of a clear and convincing congressional purpose to preempt state regulation of natural gas production in *Transcontinental* cannot control the analysis of whether EPCA preempted local regulation of petroleum product prices. *See* DACO Br. at 41-46.

Congress did not enact in the NGPA a withdrawal of the federal government from regulation of the natural gas industry, which had previously been regulated under the Natural Gas Act of 1938, 15 U.S.C. §§ 717-717z (1982). To be sure, Congress decided to give market

forces a greater role in determining some producers' prices in order to increase incentives for new gas production, but that role was within a "comprehensive federal regulatory scheme" that continued to govern many aspects of the natural gas industry. *Transcontinental*, 474 U.S. at 422. At the time of the NGPA's enactment, only one narrow category of gas—that produced from formations below 15,000 feet—was completely freed from ceiling prices in its first sale in order to provide the maximum possible incentive for additional production. It was within this context of clear evidence of congressional purpose to establish a comprehensive federal policy for pricing gas at the wellhead that this Court determined that Congress' decision to leave the price of deep gas unregulated had preemptive force. *Id.* at 422-23.

By contrast, there is no long history of federal regulation of the petroleum industry. The EPAA, as all parties agree, was a price and allocation control statute of very limited duration,[31] enacted in response to an oil supply disruption. EPCA merely extended the temporary authority for a set period and then caused it to expire. Here, unlike in *Transcontinental*, deregulation was not a narrowly framed, purposefully chosen exception to otherwise comprehensive regulation. Rather, it was an across-the-board withdrawal of the federal government from an area that it had only temporarily occupied in the first place.

Given these distinctions, *Transcontinental* does not control the outcome of this case.[32] The lesson to be learned

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[31] The original term of the statute was only fifteen months. *See* 87 Stat. 632 (1973).

[32] The Respondents argue that the distinction drawn by the Petitioners between *Transcontinental* and this case means that "federal deregulation . . . can preempt state regulation . . . only where the broad federal regulatory program remains largely in place." Esso Br. at 22; *see* Fuel Institute Br. at 54-55. The core issue is not partial deregulation versus total deregulation but whether Congress, in lifting federal controls, broadly or narrowly,

from *Transcontinental* is that which runs through all of this Court's preemption decisions: without a clear indication that Congress intends federal law alone to govern a given area, there is no preemption. This Court found such intent in the regulatory scheme of the NGPA. It cannot be found in a temporary price control statute that Congress allowed to expire in its entirety when the emergency for which it was enacted had abated.

IV. Federalism Envisions the Possibility of a Variety of Regulatory Schemes at the State Level.

Finally, Respondents raise the specter of "economic Balkanization" resulting from the potential of permitting the Commonwealth of Puerto Rico and the 50 states to regulate petroleum prices. *See* Shell Br. at 46. This concern is greatly overstated, as experience since expiration of the EPAA has demonstrated. Even if it were not, however, the Respondents quarrel is not with Puerto Rico but with the framers of the Constitution, who provided for a federal system in which each state is free, within certain constitutional limitations, to regulate its own economic affairs.

Moreover, the Constitution itself provides safeguards beyond the Supremacy Clause against the possibility of overly aggressive state action. Chief among them is the Commerce Clause, which prevents the states from legislating any form of petroleum regulation that unduly burdens interstate or foreign commerce. *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).[33] These constitutional protections, coupled with Congress' freedom to legislate preemption at any time, if the states overstep

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evidences a federal purpose with which state regulation would be inconsistent. That purpose is more likely to be found, however, where, as in *Transcontinental*, the deregulation is a narrow exception to a comprehensive regulatory scheme, and it is less likely to be found where, as here, the federal government has withdrawn entirely from the field.

[33] No claim has ever been made in this case that Puerto Rico's petroleum regulations violate the Commerce Clause.

the bounds of reasonable economic regulation, provide all the protection needed against a feared evil that to date shows litle likelihood of ever materializing.

CONCLUSION

WHEREFORE, for the forgoing reasons, as well as for the reasons set forth in their initial brief, the Department of Consumer Affairs and its Secretary, Pedro Ortiz Alvarez, respectfully request that this Court reverse the order of TECA finding that local Puerto Rican petroleum regulation has been preempted.

Respectfully submitted,

LYNN R. COLEMAN *
DOUGLAS G. ROBINSON
MATTHEW W. S. ESTES
KAREN L. MCDONALD
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

HECTOR RIVERA CRUZ
Secretary of Justice
Commonwealth of
Puerto Rico

MARCOS A. RAMIREZ IRIZARRY
DENNIS A. SIMONPIETRI MONEFELDT
RAMIREZ & RAMIREZ
117 Eleanor Roosevelt Avenue
Hato Rey, Puerto Rico 00918
(809) 758-5660

RAFAEL ORTIZ CARRION
Solicitor General
Commonwealth of
Puerto Rico

* Counsel of Record

Dated: February 10, 1988

Washington, D.C.

AMICUS CURIAE

BRIEF

No. 86-1406

NOV 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, ET AL., PETITIONERS

v.

ISLA PETROLEUM CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LOUIS R. COHEN
Deputy Solicitor General

JAMES M. SPEARS
Deputy Assistant Attorney General

JOHN HARRISON
Assistant to the Solicitor General

JOHN F. CORDES
BRUCE G. FORREST
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*, as amended by the Energy Policy and Conservation Act (Pub. L. No. 94-163, Tit. IV, 89 Stat. 941), prohibits the Commonwealth of Puerto Rico from regulating the prices charged by gasoline wholesalers.

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International Paper Co. v. *Ouellette*, No. 85-1233 (Jan. 21, 1987) 21
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Michigan Canners & Freezers Ass'n, Inc. v. *Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461 (1984) 12
Mobil Oil Corp. v. *Tully*:
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Northern Natural Gas Co. v. *State Corporation Comm'n*, 372 U.S. 84 (1963) 18
Public Service Comm'n v. *Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983) 19
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents an important question concerning the preemptive effect of a modification of a federal regulatory statute. The United States has an interest in seeing that its laws are given preemptive effect to the extent, and only to the extent, intended by Congress. At the Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

A. Federal Regulation of Petroleum Allocation and Prices

In October 1973 war in the Middle East and a resulting embargo on oil exports to the United States

caused severe disruptions in the international trade in crude oil and petroleum products (see Pet. App. 8a). In response, Congress enacted the Emergency Petroleum Allocation Act of 1973 (EPAA), Pub. L. No. 93-159, 87 Stat. 627, 15 U.S.C. 751 *et seq.*, which provided, subject to specified exceptions, for allocation and price regulation of "all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States" (§ 4(a), 15 U.S.C. 753(a)). Section 4 of the EPAA directed the President to "promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation" (*ibid.*).

The EPAA had explicit preemptive effect, but only to the extent of conflict between federal and state regulation. It provided that "[t]he regulation under section 753 of this title [Section 4 of the EPAA] and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order" (§ 6(b), 15 U.S.C. 755(b)).

Section 4(g)(1) of the EPAA originally provided that "[t]he authority [of the President] to promulgate and amend the regulation and to issue any order under this section, and to enforce under Section 5 such regulation and any such order, expires at midnight February 28, 1975, but such expiration shall not affect any action or pending proceedings, civil or criminal, not finally determined on such date, nor any

action or proceeding based upon any act committed prior to midnight February 28, 1975" (§ 4(g)(1), 15 U.S.C. (Supp. III 1973) 753 (g)(1)). Congress amended the EPAA three times to extend the President's authority; the last change set the expiration date at December 15, 1975 (Act of Nov. 14, 1975, Pub. L. No. 94-133, § 1, 89 Stat. 694).

On December 22, 1975, Congress enacted the Energy Policy and Conservation Act (EPCA), Pub. L. No. 94-163, 89 Stat. 871. The EPCA retroactively amended the EPAA, repealing Section 4(g) and, instead of terminating all federal controls at the same time, mandated a gradual phase-out of the President's duty to regulate (§§ 401-403, 89 Stat. 941-948). It provided that at the end of a 40-month phase-out the President's regulatory authority would become "discretionary rather than mandatory" and further provided that "[t]he authority to promulgate and amend any regulation or to issue any order under this Chapter shall expire at midnight September 30, 1981, but such expiration shall not affect any action or pending proceedings, administrative, civil, or criminal, not finally determined on such date, nor any administrative, civil, or criminal action or proceedings, whether or not pending, based upon any act committed or liability incurred prior to such expiration date" (§ 461, 89 Stat. 955 (§ 18 of the EPAA, as added), 15 U.S.C. 760g). Pursuant to the discretionary authority conferred by this section, President Reagan terminated all petroleum price and allocation controls on January 28, 1981 (Exec. Order No. 12,287, 3 C.F.R. 124 (1982)).

B. Puerto Rico's Regulation of Prices of Certain Petroleum Products

Since 1942, Puerto Rico has provided for the regulation of prices of and profit margins on staple commodities sold in its territory (Pet. App. 3a). In 1973, regulatory authority was vested by statute in petitioner Puerto Rico Department of Consumer Affairs (DACO) (*ibid.*). DACO and its predecessors "regulated the price of gasoline and other petroleum products from 1953 to 1973 * * *. Upon the enactment of [the EPAA], DACO suspended its regulatory authority over gasoline prices and profit margins" (*ibid.*).

In 1975, at a time when the EPAA was scheduled to expire on August 31, 1975, "DACO issued Price Regulation 45 which would restore its price controls [on petroleum products] upon expiration of the EPAA" (Pet. App. 3a). Price Regulation 45, as amended, provided that the Secretary of DACO could issue orders fixing prices and profit margins for gasoline, kerosene and diesel oil sold "at all levels of distribution" within Puerto Rico (Pet. App. 36a, 37a-38a) and required that, when no such orders were in effect, 15 days' notice be given to the Secretary before any seller raised its price for a regulated item (*id.* at 37a). When the EPCA was adopted, DACO amended Price Regulation 45 to provide that "the price regulation authority would not become effective until 'the Federal Price Controls are lifted over articles here regulated * * * '" (Pet. App. 3a, quoting P.R. DACO Price Reg. No. 45, Amend. No. 1 (1976)). Accordingly, Price Regulation 45 became effective by its terms on January 29, 1981.

On March 18, 1986, appparently in response to falling world oil prices, the Puerto Rico legislature

imposed on oil refiners an excise tax that varied with the world price of oil (1986 P.R. Laws 5; see Pet. App. 49a). On March 26, 1986, the Secretary of DACO issued an order reminding the public of his authority under Price Regulation 45 and reiterating the 15-day notice requirement (Pet. App. 42a-45a). On April 23, 1986, the Secretary of DACO issued two orders. One authorized oil refiners to pass the cost of the excise tax on to gasoline wholesalers but forbade wholesalers from passing the increase on to retailers (Pet. Supp. App. SA25), while the other capped wholesale gasoline prices at their March 31, 1986 levels (Pet. App. 47a). On May 20, 1986, the Secretary issued a third order which "lifted the freeze on gasoline prices. It divided wholesalers into two groups—minor (Group 1) and major (Group 2). Group 1 wholesalers would be allowed to sell to retailers at a profit of 8.6 cents per gallon, and Group 2 at a profit of 3.6 cents per gallon" (Pet. App. 3a; see *id.* at 49a-57a (May 20 Order)).

C. Proceedings Below

In May 1986 (before the Secretary of DACO's order of May 20), respondents filed eight actions in the United States District Court for the District of Puerto Rico challenging DACO's orders, which they claimed conflicted with federal law and with various constitutional provisions. The eight actions were consolidated, and on June 4, 1986, the district court entered judgment for respondents (Pet. Supp. App. SA86-SA87), finding "that the price/regulatory orders of March 26, April 23, and May 20, 1986, [were] unconstitutional based on the substantive due process and preemption considerations discussed herein" (*id.* at SA86). Respondents appealed the preemption de-

cision to the Temporary Emergency Court of Appeals (TECA) and the substantive due process decision to the First Circuit.[1]

A divided panel of TECA affirmed. The majority began by noting that "the primary task in deciding a pre-emption issue is to determine Congressional intent" (Pet. App. 6a) and admitted that the case was "somewhat unusual in that the claimed preemption results from the absence rather than the presence of federal authority" (*id.* at 7a). The court of appeals

[1] TECA originated in the Economic Stabilization Act Amendments of 1971 (ESAA), Pub. L. No. 92-210, § 2, 85 Stat. 749, which amended the Economic Stabilization Act of 1970 (ESA), Pub. L. No. 91-379, Tit. II, 84 Stat. 799, to specify implementing procedures for the President's temporary authority under the ESA to control wages, prices and rents throughout the economy. Under the ESA, as amended by the ESAA, TECA was to hear appeals "in cases and controversies arising under [the ESA controls] or under regulations or orders issued thereunder" (§ 2, 85 Stat. 749 (§ 211(b)(2) of the ESA)). When the EPAA was enacted, the President's authority to impose mandatory controls had not expired and TECA was still in existence. Section 5(a)(1) of the EPAA extended TECA's jurisdiction to EPAA litigation: it provided that cases and controversies under the EPAA allocation regulation were to be treated as if they arose under the ESA (15 U.S.C. 754(a)(1)). The courts of appeals have held that TECA has exclusive jurisdiction to decide preemption issues under the EPAA (Pet. App. 4a-6a; see, *e.g.*, *Mobil Oil Corp.* v. *Tully*, 639 F.2d 912, 915-916 (2d Cir.), cert. denied, 452 U.S. 967 (1981)).

On January 23, 1987, the First Circuit stayed its proceedings pending the issuance of TECA's mandate in this case (see *Tenneco Oil Co.* v. *Department of Consumer Affairs*, No. 86-1590 (1st Cir.)). On February 6, 1987, TECA stayed its mandate until this Court finally disposes of the petition (see Rule 41(b), Fed. R. App. P.).

believed, however, that this Court had held "that pre-emption can occur in these circumstances" (*ibid.*).

After a review of the history of federal regulation of oil prices (Pet. App. 7a-10a), the court of appeals turned to this Court's decision in *Tully* v. *Mobil Oil Corp.*, 455 U.S. 245 (1982). *Tully* involved a New York statute that "established a two percent tax on the gross receipts of oil companies limited to their revenues derived from their activities within the State" (*ibid.* (citation omitted)). "Desiring that the tax actually be borne by the oil companies, its intended objects, rather than by consumers, the New York Legislature prohibited the companies from passing on the cost of the tax in the price of their products sold in New York" (*id.* at 245-246). The oil company plaintiffs in *Tully* challenged the New York tax on preemption grounds, "claiming that it was in conflict with and therefore pre-empted by federal price control authority under [the EPAA]" (*id.* at 246). The district court agreed with the plaintiffs and invalidated the tax, and TECA affirmed (*Mobil Oil Corp.* v. *Tully*, 499 F. Supp. 888 (N.D.N.Y. 1980), aff'd, 653 F.2d 497 (Temp. Emer. Ct. App. 1981), vacated and remanded, 455 U.S. 245 (1982)).

This Court decided *Tully* after the President's regulatory authority had expired pursuant to Section 18 of the EPAA. The Court quoted TECA's explanation of the effect of that expiration: "[TECA] noted that the federal statute would expire by its own terms in September 1981, and that expiration of the Act 'will signal the end of federal concern in this area'" (455 U.S. at 246 (quoting 653 F.2d at 502)). The Court said that "[t]he expiration date for the federal statute has come and gone; *the only barrier to the en-*

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forcement of the antipassthrough provision no longer exists. However, the injunction entered by the District Court and affirmed by TECA did not terminate on October 1, 1981" (455 U.S. at 247 (emphasis added)). Accordingly, the Court found that "in its present form the declaration of the invalidity of the antipassthrough provision and the accompanying injunction against enforcing it have no current validity and must be set aside" (*ibid.*). Recognizing, however, that the lower courts in *Tully* had adjudicated a number of issues relating to the effects of the New York law during the period before the expiration of federal controls, the Court remanded the case to TECA to decide "what effect, if any, the expiration of federal price authority [had] on these collateral matters" (*id.* at 248 (footnote omitted)).[2]

After describing *Tully*, TECA in the present case decided that "[a]lthough *Tully* appears to answer the question we now face, the context of its appeal to the Supreme Court and the Supreme Court's recent decision in *Transcontinental* convince us that *Tully* is not an appropriate guide for our decision" (Pet. App. 11a). TECA was referring to *Transcontinental Pipe Line* v. *State Oil & Gas Bd.*, 474 U.S. 409 (1986) (*Transco*), in which this Court considered whether the Natural Gas Act (NGA), ch. 556, 52 Stat. 821, 15 U.S.C. 717 *et seq.*, continued to preempt a state "ratable-take" rule after it was amended by the Natural Gas Policy Act of 1978 (NGPA), Pub. L. No. 95-621, 92 Stat. 3351, 15 U.S.C. 3301 *et seq.* The NGPA removed FERC's authority to

[2] On remand, TECA remanded the case to the district court for further proceedings. *Mobil Oil Corp.* v. *Tully*, 689 F.2d 186, 187 (1982). The suit was settled before the district court entered any further orders (No. 80-CV-543 (N.D.N.Y.)).

regulate the price of certain high-cost natural gas. The Court found that the NGA as amended nevertheless continued to preempt the state rule. In the present case, TECA read *Transco* as requiring it to "determine whether by removing federal price control authority Congress intended to allow the states to step in and assume price control authority over gasoline" (Pet. App. 12a). The TECA majority answered that question in the negative, on the basis of its reading of the legislative history of the EPCA. Explaining that the EPCA provided for "a carefully controlled transition to an unregulated market" (*id.* at 13a), the majority found it "inconceivable that Congress would implement such an extensive and carefully orchestrated termination of federal intervention with the intention that the states step in to regulate" (*ibid.*).

Judge Christensen dissented. He emphasized the temporary, emergency nature of oil price controls: "[t]he very names of the Act and of this Court underscore their transitory nature and purpose" (Pet. App. 20a). He criticized the majority's reading of *Tully* and *Transco* (*id.* at 23a-25a) and discounted the majority's concern that state regulation might "frustrat[e] Congress' goal of allowing market forces to regulate the supply and price of petroleum products," noting that "[t]here are already constitutional limitations on the exercise of [the states'] police power * * * and Congress, of course, has the power to deal with any concern of this nature in light of the Supremacy Clause" (*id.* at 26a). He added that under the decision below TECA would have to continue deciding preemption cases "long after adjudications of the validity and effect of the regulations and programs under ESA and the EPAA have been fully completed" (*ibid.*).

SUMMARY OF ARGUMENT

Congress has broad power under the Commerce Clause and the Supremacy Clause to preempt state regulation of the prices of petroleum products, but it may do so only by passing laws. The only pertinent statutory provision now extant is Section 18 of the EPAA, added by the EPCA, which terminated the President's regulatory authority under the EPAA as of September 30, 1981. TECA's ruling that the DACO orders were preempted was based either on a supposed congressional policy that does not inhere in any federal statute, or on an implication it found in Section 18. In either case the ruling was error.

TECA stated that the adoption of Section 18, bringing federal regulation to an end, was the result of a "federal decision to deregulate the gasoline market" (Pet. App. 7a). TECA appears to have given preemptive effect to this supposed general "decision," without regard to whether Section 18 itself either explicitly or implicitly bars state regulation. But a congressional sentiment, even if accurately gauged, is "the Supreme Law of the Land" only to the extent that it is embodied in a "law[] of the United States." Cf. *INS* v. *Chadha*, 462 U.S. 919, 951-958 (1983). TECA's analysis should have been limited to interpreting the statute now in force.

To the extent that TECA was interpreting Section 18 as implicitly preempting state regulation, its interpretation was incorrect. The language of Section 18 and the legislative history of the EPCA do not warrant the inference either that Congress intended to preempt state law or that Congress intended to impose a comprehensive federal policy or scheme of regulation that would be violated or frustrated by Puerto Rico's law.

TECA's decision appears to have been based on a misreading of this Court's decision in *Transco*. That case held that a state "ratable take" order was preempted by the Natural Gas Act (NGA), 15 U.S.C. 717 *et seq.*, after it was amended by the Natural Gas Policy Act (NGPA), 15 U.S.C. 3301 *et seq.* But the Court's ruling in *Transco* rested on its determination that the NGA and the NGPA created a continuing "comprehensive federal regulatory scheme" (474 U.S. at 422) with which the state order conflicted. Respondents did not show, and the courts below did not find, any such continuing comprehensive federal scheme here.

ARGUMENT

THE EMERGENCY PETROLEUM ALLOCATION ACT OF 1973, AS AMENDED, DOES NOT NOW PROHIBIT THE COMMONWEALTH OF PUERTO RICO FROM REGULATING THE PRICES CHARGED BY GASOLINE WHOLESALERS

A. Only an Operative Federal Statute Can Preempt State Law

It is a "familiar and well-established principle that the Supremacy Clause * * * invalidates state laws that 'interfere with, or are contrary to' federal law." *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712 (1985) (quoting *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824)). The Supremacy Clause makes "[t]his Constitution, and the laws of the United States which shall be made in Pursuance thereof * * * the supreme Law of the Land" (U.S. Const. Art. VI, Cl. 2). There is no doubt that Congress could, by enacting legislation otherwise within its powers, have prohibited Puerto Rico from regulating gasoline prices (*e.g.*, *Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977)) or could

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have adopted a federal regulatory scheme with which Puerto Rico's law is inconsistent and by which it is implicitly preempted (*e.g., Michigan Canners & Freezers Ass'n, Inc.* v. *Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461 (1984)).

But Congress's preemptive power must be exercised by enacting a statute. Article I, Section 7, prescribes the exclusive means by which "laws of the United States" are to be adopted (*INS* v. *Chadha*, 462 U.S. 919, 951-958 (1983)). As we said at the petition stage, there cannot be a preemptive grin without a statutory cat.

Section 6(b) of the EPAA, 15 U.S.C. 755(b), once gave that statute explicit preemptive effect: "The regulation under [§ 4, 15 U.S.C. 753] and any order issued thereunder shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order." But Section 18 of the EPAA, added by the EPCA, provides that "[t]he authority to promulgate and amend any regulation or to issue any order under this [Act] shall expire at midnight September 30, 1981" (§ 461, 15 U.S.C. 760g). As this Court recognized in *Tully*, when the President's regulatory authority expired, the preemptive effect of Section 6(b) expired with it.[3]

[3] In its decision in *Tully*, TECA had ruled that state regulation of gasoline prices was preempted during the period after President Reagan lifted all controls but before his authority to impose them expired (*Mobil Oil Corp.* v. *Tully*, 653 F.2d 497, 502 (1981), vacated and remanded, 455 U.S. 245 (1982)). TECA ruled that, since the President had exercised his statutory authority to lift regulation, state control

TECA ruled that the Puerto Rico regulation was preempted despite the expiration of Section 6(b) and without attributing the preemptive effect to any particular extant provision of federal law. Instead, TECA explained that it was "determining the preemption effect of the federal decision to deregulate the gasoline market" (Pet. App. 7a). But not every congressional "decision" is a "law of the United States." For example, when Congress "decides" not to legislate, that decision, standing alone, cannot have preemptive effect. And while the legislation that causes a federal regulatory program to expire is of course a law, the deregulatory sentiment that inspired the legislation, even if accurately gauged, is a law only insofar as it is reflected in a rule that is explicit or implicit in the statutory language. To the extent that TECA meant to be giving preemptive effect to what it perceived to be congressional policy unembodied in any statute, its action was error.

B. No Extant Provision of Federal Law Preempts Puerto Rico's Regulation of Gasoline Prices

The only pertinent part of the EPAA that could be said to be now in force is Section 18, 15 U.S.C. 760g, added by the EPCA, which terminated the President's regulatory authority on September 30,

of prices was inconsistent with the President's decision (*Tully*, 653 F.2d at 502). TECA nevertheless appeared to recognize that all the ongoing legal effects of the EPAA, including preemption, would terminate when the President's regulatory power ended: "When the statute expires in September 1981, it will signal the end of federal concern in this area" (*ibid.*). As noted above (see pp. 7-8, *supra*), this Court later endorsed that conclusion, saying (455 U.S. at 247) that since expiration "the only barrier to the enforcement of [an inconsistent state regulation] no longer exists."

1981. TECA's inquiry should have been limited to whether that provision explicitly or implicitly bars the Puerto Rico regulatory actions at issue in this case. We think it clear that if TECA had conducted that inquiry in accordance with this Court's instructions, its answer would have been in the negative.

This Court has "consistently emphasized that the first and fundamental inquiry in any pre-emption analysis is whether Congress intended to displace state law, and where a congressional statute does not expressly declare that state law is to be pre-empted, and where there is no actual conflict between what federal and state law prescribe, we have required that there be evidence of a congressional intent to pre-empt the specific field covered by the state law" (*Wardair Canada, Inc.* v. *Florida Dep't of Revenue*, No. 84-902 (June 18, 1986), slip op. 4). Section 18 does not "declare that state law is to be pre-empted," and there plainly is no "actual conflict" between Section 18 and Puerto Rico's actions. The only remaining question is whether the language or legislative history of Section 18 evidences an intent to bar states from the field covered by the Puerto Rico regulation.

There certainly is no such evidence in the language. As this Court recognized in *Tully*, the language of Section 18 has a natural and obvious meaning.[4] The centerpiece of the EPAA had been

[4] TECA asserted (Pet. App. 11a) that this Court's discussion in *Tully* probably was dictum. But that is wrong: the Court vacated TECA's judgment because the district court's injunction extended beyond September 30, 1981, after which the EPAA no longer provided a basis for barring state regulation (see 455 U.S. at 246-247). However, although the statement in *Tully* was necessary to the Court's disposition, the case had not been briefed on the merits and the effect of the expiration of federal regulatory authority does not appear to have been raised explicitly by the parties.

the President's regulatory authority; all of the statute's other legal consequences, including explicit pre-emption, derived from that. Section 18 has caused that authority to expire, bringing the statute's continuing legal effect to an end, so that "the only barrier to the enforcement of [the state regulation at issue in that case] no longer exists" (455 U.S. at 247).[5] Moreover, while it is an extant statutory provision, Section 18 is not what the EPAA was before the President's regulatory authority expired: a substantive federal regulatory program. Section 18, therefore, does not contain the element that this Court has relied on whenever it has found that a state law " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Hillsborough County* v. *Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)).

[5] Congress evidently thought that the EPAA would be of no further general effect after September 30, 1981, because it added a savings clause to Section 18 preserving "any action or pending proceedings, administrative, civil, or criminal, not finally determined on [the expiration date]" and "any administrative, civil, or criminal action or proceeding, whether or not pending, based upon any act committed or liability incurred prior to such expiration date" (15 U.S.C. 760g). The general rule is that when a temporary law expires the act "by its own terms be[comes] a dead letter" (*Burke* v. *Barnes*, No. 85-781 (Jan. 14, 1987), slip op. 3). Savings clauses are necessary to escape the common law rule under which it is "well settled, that an offence against a temporary act cannot be punished after the expiration of the act, unless a particular provision be made by law for the purpose" (*The Irresistible*, 20 U.S. (7 Wheat.) 551, 552 (1822) (Marshall, C.J.)).

TECA said that "the legislative history [of the EPCA] convinces us that Congress intended to establish a market free of *any* government control other than standby emergency controls" (Pet. App. 14a). Any such inference from the legislative history would, however, be at best indirect: there is not to our knowledge any explicit suggestion anywhere in the legislative history that state laws would continue to be preempted after the termination of federal regulatory authority on September 30, 1981. The question of continuing preemption does not appear to have been mentioned at all.

TECA based its conclusion on the reference in the Senate Conference Report to " 'a gradual return to an unregulated market' " (Pet. App. 13a, quoting S. Conf. Rep. 94-516, 94th Cong., 1st Sess. 203 (1975)) and similar general comments. TECA asserted that "the possibility of over 50 individual regulatory schemes operating in the petroleum products markets clearly conflicts with and frustrates Congress' goal of allowing market forces to regulate the supply and price of petroleum products" (Pet. App. 13a-14a). But legislation terminating regulation should not be read, on such flimsy evidence as this,[6] as embodying a federal ban on state regulation as well. State regulation may be addressed to local conditions, and may not give rise to the considerations that led Congress to eschew regulation at the federal level. That is why this Court has frequently stated (see, *e.g.*, *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) that Congress should not be presumed to have intended to override state regulatory choices. This very case involves a regulation premised on perceived imperfections in the market for gasoline in Puerto Rico (Pet. Supp. App. SA21-SA23). As Judge Christensen noted in dissent, "Puerto Rico, because of its isolation and the essentially local nature of its oil business, presents a peculiar situation" (Pet. App. 26a). TECA referred to no evidence that Congress would want to preempt such local regulation, and we are aware of none.

[6] Indeed, the phrase TECA quoted from the Senate Conference Report— "*return* to an unregulated market"— implies the elimination of federal controls only. As noted at p. 4, *supra*, Puerto Rico was free to, and did, impose price controls on gasoline in the pre-EPAA era to which Congress sought to "return."

More generally, both the role of the States in the federal system and practical considerations bearing on the interpretation of federal statutes support the traditional presumption that Congress does not intend to require state regulatory policy to track federal regulatory policy unless it affirmatively indicates that intention. As Judge Christensen pointed out in dissent below (see Pet. App. 26a), Congress can easily affirmatively prohibit state regulation that it believes would defeat proper federal objectives. It is much more sensible to require it to do so than to presume preemption and require Congress to negate that presumption. That is why this Court has always made "the basic assumption that Congress did not intend to displace state law." *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981) (citing *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. at 230). Here, the legislative history on which TECA relied does not demonstrate an intent to displace state law; it certainly is not enough to overcome the contrary presumption required by this Court's cases. See, *e.g.*, *R.J. Reynolds Tobacco Co.* v. *Durham County*, No. 85-1021 (Dec. 9, 1986), slip op. 9; *Commonwealth Edison Co.* v. *Mon-*

tana, 453 U.S. 609, 633-634 (1981) (preemption on basis of general national policy not favored).

C. The *Transco* Case Does Not Support a Finding of Preemption

TECA concluded that it was authorized by this Court's instructions in *Transco* to infer preemption "from the absence rather than the presence of federal authority" (Pet. App. 7a). TECA said, "[a]s in *Transcontinental*, we must determine whether by removing federal price control authority Congress intended to allow the states to step in and assume price control authority over gasoline" (Pet. App. 12a). But TECA's reading of *Transco* reflects a fundamental misunderstanding of that case. *Transco* did not hold that, whenever Congress has terminated federal regulation of an economic area, there must be an affirmative showing of congressional permission before states may regulate in that area even if it is one well within their traditional police powers.[7]

In *Transco*, this Court found that state regulation was preempted by a continuing federal regulatory program, not by the termination of regulatory authority. The Court had previously held in *Northern Natural Gas Co.* v. *State Corporation Comm'n*, 372 U.S. 84 (1963), that the Natural Gas Act (NGA) provided a "comprehensive scheme of federal regulation" (*id.* at 91) that preempted a state "ratable take order." Thereafter, in the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301 *et seq.*, Congress amended the NGA, lifting federal price regulation of certain "high-cost natural gas." The question

[7] Controls over prices to be charged within their territories are, of course, a traditional form of state regulation. See, *e.g.*, *Munn* v. *Illinois*, 94 U.S. 113, 125 (1876).

in *Transco*, which involved a "virtually identical [ratable take] regulation," (*Transco*, 474 U.S. at 411) was "whether Congress, in enacting the NGPA, altered those characteristics of the federal regulatory scheme which provided the basis in *Northern Natural* for a finding of preemption" (*id.* at 417).

The Court ruled that ratable take orders continued to be preempted. It noted that the NGPA was "'a comprehensive statute to govern future natural gas regulation'" (*Transco*, 474 U.S. at 420 (quoting *Public Service Comm'n* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319, 332 (1983)), and "[did] not constitute a federal retreat from a comprehensive gas policy" (*Transco*, 474 U.S. at 421). It then found that the Mississippi ratable-take rule "[ran] afoul of other concerns identified in *Northern Natural*" (*id.* at 423) because it disturbed "the uniformity of the federal scheme" and "would have the effect of increasing the ultimate price to consumers" (*ibid.*), both subjects of concern to ongoing federal regulation. In sum, the Court in *Transco* based its conclusion on its understanding of a "comprehensive federal regulatory scheme" (*id.* at 422).

When the Court said, in *Arkansas Elec. Coop. Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983), cited by TECA at Pet. App. 7a, that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated," it was discussing a field in which Congress had passed comprehensive legislation explicitly allocating regulatory authority between state and federal agencies (461 U.S. at 378-380). The same was true in *Transco*. A comprehensive federal regulatory scheme within which one area has been deliberately left unregulated obviously may

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(if that is determined to be Congress's intention) preempt state regulation in that area.[8] The present case is quite different: TECA concluded here that Congress intended to preempt despite the absence of any continuing federal involvement. *Transco* does not warrant that leap.[9]

TECA misunderstood *Transco*, taking it to stand for a proposition that it does not support and that is not correct. The question this Court framed in *Transco*—" 'whether Congress, in revising a comprehensive federal regulatory scheme to give market forces a more significant role [* * *] intended to give the states the power it had denied FERC' " (Pet. App. 12a (quoting *Transco*, 474 U.S. at 422))—was appropriate: Congress had deliberately created some open spaces within a federal regulatory scheme, and

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[8] When Congress repeals a federal law that has preemptive effect, or provides that such a law will expire, it can, of course, also provide that state and territorial law will continue to be preempted even after substantive federal control has been lifted. But *Transco* does not authorize a court to presume that a repealing statute has that effect when Congress does not say so.

[9] In discussing the legislative history of the EPCA, TECA said that its enactment "evidence[d] Congressional recognition of the continuing necessity for a strong national policy on energy" (Pet. App. 14a), without distinguishing between Title IV of the EPCA, which amends the EPAA, and the other titles, which frame a national energy policy. The court of appeals thus implied, at least, that it may have thought that those other titles have the same effect as the continuing regulatory structure that was dispositive in *Transco*. We do not, however, understand TECA to have relied on any statute other than the EPAA in finding preemption. As that court knows well (see Pet. App. 4a-6a, 14a), its jurisdiction is limited to the EPAA and the ESA (see n.1, *supra*).

the Court naturally inquired whether it intended to invite the States to fill them. The question TECA framed in this case—whether "Congress * * * intend[ed] to give the states the power it has denied the federal government" (Pet. App. 17a)—was wholly inappropriate. Congress does not have to give the States power for them to be able to regulate economic transactions within their territories; the States are disabled only by the Constitution or by a law of the United States with which state regulation is inconsistent. The analysis always " 'start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525 (1977) (quoting *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. at 230). See, *e.g.*, *International Paper Co.* v. *Ouellette*, No. 85-1233 (Jan. 21, 1987), slip op. 9; *California Fed. Savings & Loan Ass'n* v. *Guerra*, No. 85-494 (Jan. 13, 1987), slip op. 8; *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142 (1963)).

Respondents, in their Supplemental Response at the petition stage, vigorously accuse the United States of departing from the Court's analysis in *Transco*. Their real problem, however, is to bring the facts and circumstances of this case within the holding of that one—to show that Congress did not intend merely to "return" to pre-EPAA conditions in which Puerto Rico was free to regulate gasoline prices to meet local needs, but intended a continuing "comprehensive federal regulatory scheme" with which Puerto Rico's regulation is inconsistent. This they have utterly failed to do.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

LOUIS R. COHEN
Deputy Solicitor General

JAMES M. SPEARS
Deputy Assistant Attorney General

JOHN HARRISON
Assistant to the Solicitor General

JOHN F. CORDES
BRUCE G. FORREST
Attorneys

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AMICUS CURIAE

BRIEF

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No. 86-1406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,
Petitioners,

v.

ISLA PETROLEUM CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the Temporary Emergency Court of Appeals

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BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

AMY LOESERMAN KLEIN
SHORT, KLEIN & KARAS, P.C.
1101 30th Street, N.W.
Suite 303
Washington, D.C. 20007
(202) 342-3000
Of Counsel

BENNA RUTH SOLOMON
Chief Counsel
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether federal deregulation in an area in which state law had been preempted implies that Congress intended to foreclose resumption of state regulation.

2. Whether *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 474 U.S. 409 (1986), created a new presumption of congressional intent to continue the preemptive effect of federal law upon its expiration.

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IN THE

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Petitioners,

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**On Writ of Certiorari to the
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BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL CONFERENCE OF STATE LEGISLATURES, U.S. CONFERENCE OF MAYORS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* and their members

have a vital interest in legal issues that affect the powers and responsibilities of state and local governments.

The Temporary Emergency Court of Appeals (TECA) invalidated on preemption grounds Puerto Rico's reinstatement of gasoline price controls after the expiration of the Emergency Petroleum Allocation Act, which had concededly precluded such state action. *Amici* are deeply concerned that the reasoning of the court below will deprive state and local governments of their ability to act on matters of traditionally local concern, and open wide regulatory gaps, by inferring preemption where Congress has withdrawn from a field, or has failed to act.

The decision below rests upon an insupportable inference from this Court's decision in *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 474 U.S. 409 (1986) (*Transco*), that the preemptive effect of federal legislation survives the repeal of that legislation unless Congress specifically declares its intention to the contrary. Such a reading of *Transco* effectively repudiates principles deeply embedded in this Court's jurisprudence.

The expansive view of preemption adopted by TECA seriously threatens our federal system, which presumes not preemption but the power of state and local governments to regulate matters of local concern. Against the backdrop of the expansive scope of federal regulation and the current climate of deregulation, our constitutional framework cannot admit of preemption simply on the basis that the subject concerns an area in which Congress has acted, refrained from acting, or withdrawn prior actions. Nor should this Court permit the permanent stifling of all state initiative and power to address particular issues of local concern simply because the current national economic philosophy favors the fostering of an unfettered marketplace.

Amici urge the Court to rule that, when Congress ends federal regulation in an area of traditional state author-

ity, state power is restored intact, unless Congress explicitly expresses an intention to the contrary. Such a ruling would establish clear guidelines for the Congress and the judiciary and pretermit results like the one reached below. At the least, *amici* urge this Court to make clear that *Transco* does not mandate the theory of pervasive, permanent preemption adopted by TECA. Because of the great importance of the issues to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT OF THE CASE

Since 1942 Puerto Rico has had a system of price controls on staple commodities. Law No. 228 of 1942, 23 L.P.R.A. § 734 (1964). Gasoline is such a commodity. Gasoline has been actively regulated by Puerto Rico since 1953 (Pet. App. 60a-66a).

The Emergency Petroleum Allocation Act of 1973 (EPAA), Pub. L. No. 93-159, 87 Stat. 627, 15 U.S.C. § 751 *et seq.*, required, explicitly, that any state laws or regulations in conflict with its terms were preempted. Accordingly, upon its enactment, Puerto Rico's price control of gasoline terminated.

The EPAA was due to expire on December 15, 1975. In anticipation thereof, Puerto Rico's Department of Consumer Affairs (DACO), which administers Puerto Rico's price control program, issued Regulation No. 45. That regulation contemplated the exercise of renewed regulatory power over gasoline prices charged in Puerto Rico once federal price controls were lifted (Pet. App. 36a). On December 22, 1975, however, Congress enacted the Energy Policy and Conservation Act (EPCA), Pub. L. No. 94-163, 89 Stat. 871, which empowered the President to continue price controls at his discretion, and explicitly continued the preemption of state action in this

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[1] Under Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

area, 15 U.S.C. § 755(b). President Reagan terminated petroleum price and allocation controls on January 28, 1981. Exec. Order No. 12,287, 3 C.F.R. 124 (1982). Puerto Rico's system of price controls became effective when federal controls were lifted. (Pet. App. 36a-41a).

Puerto Rico did not implement its regulatory program until five and a half years later, when DACO observed that Puerto Rican wholesale gasoline prices were not reflecting price decreases experienced in world markets in 1985 and especially in the first quarter of 1986 (Pet. App. 50a). DACO then issued three orders fixing wholesalers' gross profit margins (Pet. App. 42a-57a). Respondents, companies engaged in the refining and wholesale gasoline business in Puerto Rico, brought this action in U.S. District Court for the District of Puerto Rico challenging the authority of Puerto Rico, through DACO, to regulate gasoline prices on the island.

The district court held that Regulation No. 45 and the orders issued by DACO pursuant thereto were unconstitutional under the Supremacy Clause, having been preempted by Congress. *Isla Petroleum Corp. v. Department of Consumer Affairs*, 640 F. Supp. 474, 515 (D.P.R. 1986). In reaching that decision, the court found that DACO retained price control over gasoline in three types of situations: (1) in emergency situations involving "natural and physical disasters affecting public health and safety" (*id.* at 514); (2) energy conservation measures including those depressing consumer demand (*ibid.*); and (3) laws promoting goals unrelated to "emergency preparedness," such as consumer education or fair trade supervision (*ibid.*). With respect to price control, however, the court concluded that the regulation and orders complained of were "preempted by the federal Congressional delegated purpose to let the market forces be the sovereign in this field" (*id.* at 515).[2]

[2] The district court also looked to subsequent legislation *in Puerto Rico* as support for this "free market" rationale:

[footnote continued]

The preemption issue was appealed to the Temporary Emergency Court of Appeals (TECA), which sustained the district court's determination on the ground that Congress, in furtherance of its free market philosophy, intended the expiration of the EPCA to terminate all future state regulation in the nature of price or profit controls. *Isla Petroleum Corp. v. Puerto Rico Department of Consumer Affairs*, 811 F.2d 1511 (TECA 1986). TECA acknowledged this Court's holding, in *Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982) (per curiam), that the EPAA, after its expiration, did not preempt a New York state price control statute which clearly had been preempted prior to the expiration of the EPAA and the EPCA. TECA said, however, that this Court had set a new standard for judging the preemptive effect of expired federal legislation on state authority in *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 474 U.S. 409 (1986) (*Transco*). Thus, TECA held, in effect, that *Transco* overturned *Tully*.[3]

Having disposed of the precedent holding that after the expiration of the EPAA and the EPCA, those statutes

[2] [Continued]

The most recently-expressed legislative intent in gasoline control in Puerto Rico is that we also join the trend of a free market operation at this level. *See* 23 L.P.R.A. Secs. 1101-1135.[37]

[37] At 23 L.P.R.A. Sec. 1132(b), Puerto Rico's Legislature fully recognized *this cardinal economic principle* by stating that in the gasoline industry there should prevail commercial practices that promote the free competition.

640 F.Supp. at 514 (emphasis supplied). The court appended to its decision editorials from a San Juan newspaper criticizing DACO and its regulatory philosophy on the basis of the free market philosophy (*id.* at 515-17).

[3] "Although *Tully* appears to answer the question we now face, the context of its appeal to the Supreme Court and the Supreme Court's recent decision in *Transcontinental* convince us that *Tully* is not an appropriate guide for our decision." 811 F.2d at 1516.

did not preempt state price controls in the intrastate gasoline business, TECA set out to determine anew legislative intent with respect to state regulation of wholesale or retail prices of gasoline sales in local markets.[4] TECA's manner of commencing the inquiry is instructive. Paying not even lip service to the oft-recited canons regarding deference to the existence of state power in the absence of a clear congressional preemptive intent,[5] TECA said that its job was to "determine whether by removing federal price control authority Congress intended to allow the states to step in and assume price control authority over gasoline." 811 F.2d at 1516. Having thus reversed the presumption on the preemption issue, TECA reviewed the legislative history of the expiration mechanism. It determined that federal deregulation was undertaken for the purpose of allowing "market forces to operate freely" (*id.* at 1517). Such a purpose, said TECA, evidenced a congressional intention to bar all state interference with a free market (*ibid.*).[6]

As further support for its position, TECA reviewed *post*-1981 congressional debates and proposed legislation. It found therein further substantiation of the congressional and Presidential belief in the free market.[7] Finding that the Puerto Rico law and DACO's orders interfered with that free market, TECA concluded that they were preempted.

[4] For purposes of applying preemption principles, the Commonwealth of Puerto Rico is treated as a State. *See Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937). Accordingly, the term "State," when used in this brief for the purposes of discussing issues of federalism, includes Puerto Rico.

[5] *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

[6] "It is inconceivable that Congress would implement such an extensive and carefully orchestrated termination of federal intervention with the intention that the states step in to regulate the same subject matter as soon as all federal intervention ceased." 811 F.2d at 1517.

[7] "What is clear is that both supporters and opponents of the [Standby Petroleum Allocation Act of 1982] placed great reliance on market forces as the best means of avoiding supply disruptions. . . . The fact that the Senate sustained President Reagan's veto is further evidence of a strong national policy to rely on market forces, even in the case of an emergency. . . . Congress intended to rely almost exclusively on market forces to determine prices and allocate supplies of petroleum products and to avoid governmental interference with market mechanisms. . . . Congress did not by enactment of the EEPA [Energy Emergency Preparedness Act of 1982] alter the free market policy it had expressed in the EPCA. Rather, it reiterated that policy. . . . The legislative history of the EEPA demonstrates Congress' continuing efforts to retain an unregulated market and is additional evidence of its previous intent to establish a market free of any government interference." 811 F.2d at 1518-19.

SUMMARY OF ARGUMENT

1. The traditional division of functions between state and federal governments reserves regulation of intrastate prices to state authority; the federal government has entered the field only sporadically and in response to war or economic emergencies. The current standard for evaluating the intention of Congress to preempt state authority has not resulted in clear, uniformly applied guidelines, but rather, an escalating number of cases searching for clues to a presumed actual congressional intent. This Court should hold that when Congress withdraws federal regulation in an area of traditional state authority, without an explicit statement of continued preemption, state power is restored intact. Not only would such a rule avoid repetitions of TECA's error in this case, but it would permit States to participate meaningfully on the preemption issue in legislative debates. Application of such a rule would work no hardship upon Congress, which has not been reluctant to state explicitly its intentions to preempt state authority when it has reached that legislative conclusion.

2. The basis of TECA's decision here was that a congressional determination to remove federal price controls

on a commodity in order to return to free market conditions henceforth bars States from imposing curbs on the same commodity. Inferring the termination of state power to respond to specific situations from Congress's decision to remove federal controls is directly contrary to basic notions of federalism. Its inappropriateness is sharply illustrated by this case. Puerto Rico's economy is significantly different from that of other jurisdictions, and its economic solutions may lie in the application of theories inappropriate at the national level.

More than fifty years ago, Justice Brandeis explained the advantages to the federal system of promoting economic experimentation. *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932) (Brandeis, J., dissenting). That opinion, which has been cited and honored by this Court since it was written, was rendered precisely in the context of a debate over free market versus state control. Requiring all States to observe the federally revived free market theory portends the results of which the *New State Ice* dissent forewarned: the erosion of the advantages of federalism in the realm of economic experimentation.

3. TECA conceded that, in the absence of *Transco*, Puerto Rico's power to issue the challenged regulation and orders was validated by this Court in *Tully v. Mobil Oil Corp.* TECA's conclusion that *Transco* in effect overruled *Tully* is wrong. *Transco* did not consider, much less alter, this Court's often repeated assumption that Congress does not intend to displace state law. Rather, *Transco* held that a particular deregulatory amendment, adopted to permit supply and demand to set prices at a particular point in a regulated industry, did not create a void permitting state intervention at that point. This holding does not mandate a bar to all state regulation of prices that were once federally controlled.

The decision below rests on an inappropriate reading of *Transco*; it precludes the ability of Puerto Rico (and,

by necessary implication, every State) to address specific problems of gasoline wholesale and retail prices; and it was not based upon an explicit statement of Congress to accomplish those results. The judgment below should therefore be reversed.

ARGUMENT

I. IN THE ABSENCE OF EXPLICIT PREEMPTION, THIS COURT SHOULD NOT FIND THAT CONGRESSIONAL DEREGULATION PREEMPTS STATE POWER IN AREAS OF TRADITIONAL STATE AUTHORITY.

The federal government's entry into price fixing has been sporadic and related to war or economic emergencies.[8] The States, however, may exercise continuous power over intrastate prices upon showing that such a policy is reasonably required to promote the public welfare. *Nebbia v. New York*, 291 U.S. 502 (1934).[9] In interpreting

[8] The first set of federal price controls was enacted during World War II. Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23, former 50 U.S.C. app. § 901 *et seq.* The Price Control Extension Act of 1946, ch. 671, 60 Stat. 664, extended the controls established by the 1942 legislation through 1946 for the purpose "of making possible a successful transition to a peace-time economy . . . ." *Id.* § 3. The federal government's next entry into price controls occurred because of the Korean War. Defense Production Act of 1950, ch. 932, 64 Stat. 798, former 50 U.S.C. app. § 210 *et seq.* The authority to impose price controls under this Act expired on April 30, 1953. The last federal foray into general price controls, Economic Stabilization Act of 1970 (ESA), Pub. L. No. 91-379, Tit. II, 84 Stat. 799, 12 U.S.C. § 1904 note, occurred during a time of spiraling inflation, and was intended to curb that situation. See ESA § 202 (price control authority granted "in order to stabilize economy, reduce inflation, improve the Nation's competitive position in world trade, and protect the purchasing power of the dollar"). Controls under the ESA were short lived. Prices were frozen for 90 days on August 15, 1971, and relaxed for a three-month period thereafter. All authority to impose price controls under the ESA expired on April 30, 1974. The federal government's entry into petroleum price controls is described *supra*, pp. 3-4.

[9] The exercise of such power must not infringe upon federal prerogatives by constituting a burden on interstate commerce. *See City of Philadelphia v. New Jersey*, 437 U.S. 617, 623-24 (1978).

the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23, former 50 U.S.C. app. § 901 *et seq.*, this Court recognized that price regulation was a traditional area of state, not federal, concern: "We think Congress desired to depart from the traditional partitioning of functions between state and federal government only so far as required to erect emergency barriers against inflation." *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 151 (1944).

The test for determining whether a particular law or action has been preempted by federal regulation has been developed by this Court in a number of decisions, well summarized recently in *Louisiana Public Service Comm'n v. FCC*, 106 S.Ct. 1890, 1898 (1986) (parallel citations omitted):

> The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to pre-empt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), when there is outright or actual conflict between federal and state law, *e.g.*, *Free v. Bland*, 369 U.S. 663 (1962), where compliance with both federal and state law is in effect physically impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963), where there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. *Hines v. Davidowitz*, 312 U.S. 52 (1941).

Although these principles have been developed and applied in numerous cases, they have apparently provided insufficient guidance. Preemption questions continue to occupy a prominent place on the Court's docket and to occasion error on the part of the lower federal courts

and the state courts. Thus, this Court reversed the judgments under review in both *Louisiana Public Service Comm'n*, *supra*, and *California Coastal Comm'n v. Granite Rock Co.*, 107 S.Ct. 1419 (1987), and sustained state action as *consistent* with federal legislation covering the same industry or subject matter, whereas in *Transco*, the Court also reversed the judgment in determining that state action was preempted as *inconsistent* with federal law. Last Term, the Court issued fifteen decisions on preemption issues,[10] and, at this time, there are pending five cases raising preemption issues comparable to those decided so recently in *Louisiana Public Service Comm'n* and *Transco*.[11]

Amici respectfully suggest that the tests thus far developed have produced neither consistency nor predictability. They constitute an invitation to the judiciary to romp through realms of legislative history, post-legislative history, and social, economic, and political philosophy, all to find whether Congress had an "intention" to super-

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[10] *Perry v. Thomas*, 107 S.Ct. 2520 (1987); *Caterpillar Inc. v. Williams*, 107 S.Ct. 2425 (1987); *Fort Halifax Packing Co. v. Coyne*, 107 S.Ct. 2211 (1987); *IBEW, AFL-CIO v. Hechler*, 107 S.Ct. 2161 (1987); *Rose v. Rose*, 107 S.Ct. 2029 (1987); *CTS Corp. v. Dynamics Corp. of America*, 107 S.Ct. 1637 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 107 S.Ct. 1549 (1987); *Metropolitan Life Ins. Co. v. Taylor*, 107 S.Ct. 1542 (1987); *California Coastal Comm'n v. Granite Rock Co.*, 107 S.Ct. 1419 (1987); *California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083 (1987); *Western Air Lines, Inc. v. Board of Equalization*, 107 S.Ct. 1038 (1987); *International Paper Co. v. Ouellette*, 107 S.Ct. 805 (1987); *California Fed. Sav. & Loan Ass'n v. Guerra*, 107 S.Ct. 683 (1987); *R.J. Reynolds Tobacco Co. v. Durham County*, 107 S.Ct. 499 (1986); *Rose v. Arkansas State Police*, 107 S.Ct. 334 (1986).

[11] In addition to this case, there are *Schneidewind v. ANR Pipeline Co.*, No. 86-986, *cert. granted*, Feb. 23, 1987; *Goodyear Atomic Corp. v. State ex rel. Miller*, No. 86-1172, *juris. noted*, June 22, 1987; *Mississippi Power & Light Co. v. Mississippi*, No. 86-1970, *juris. postponed*, Oct. 5, 1987; and *Lingle v. Norge Div. of Magic Chef, Inc.*, No. 87-259, *cert. granted*, Oct. 13, 1987.

sede state authority in a situation in which Congress kept mum. Clearer guidance is needed from this Court. This Court should require an explicit statement by Congress that it intends to continue to supplant state authority upon the repeal or expiration of a federal statute, especially in areas where the States, rather than the federal government, are the traditional or primary governmental authority.

The issue of preemption in areas of predominant state interest, such as wholesale or retail intrastate price control, is not likely to be congressionally overlooked by inadvertence. On the contrary, Congress addresses these issues specifically,[12] and often with great precision.[13] Nor has Congress overlooked the effect of deregulation on preemption.[14]

It would work no hardship upon the Congress to require it—when such is its intent—explicitly to legislate preemption when federal regulation is withdrawn, particularly in areas of historic or primary state concern. On the other hand, such a rule would serve a number of salutary purposes. It would bring the issue of preemption out into the open and thus permit the States to participate, through the political process, in a democratic and meaningful debate, rather than as an advocate in a judicial game called find-the-legislative-intent. *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550-55 (1985). It would preserve to the judiciary that field which is rightfully theirs, namely determining legislative intent in the interstices, not in the nuclei, of

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[12] See 49 U.S.C. § 11501(d) (giving ICC authority to regulate intrastate rail rates); 49 U.S.C. § 11501(e) (giving ICC authority to regulate intrastate motor carrier rates).

[13] See, *e.g.*, 15 U.S.C. § 2075 (consumer product safety standards); 42 U.S.C. § 6297 (home appliance energy efficiency standards).

[14] See Surface Freight Forwarder Deregulation Act of 1986, Pub. L. No. 99-521, 100 Stat. 2997, 49 U.S.C. § 11501(g); S. Rep. No. 120, 99th Cong., 2d Sess. 16 (1986), reprinted in 5 U.S. Code Cong. & Ad. News 5028, 5043 (1986).

legislation. *See, e.g., Saxbe v. Bustos*, 419 U.S. 65, 80 (1974); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). Finally, by establishing a clear cut rule, this Court would discourage the kind of speculative analysis indulged in by the district court and TECA in this case. Requiring Congress to state its intentions if it wishes to supersede state authority preserves the correct balance of power not only between the federal and state governments, but also between the legislative and judicial branches of the federal government.

Applying such a principle to this case would yield a clear result that Congress has not, under any and all future circumstances, prohibited Puerto Rico, and every State of the Union, from wholesale and retail gas price regulation. Congress could have provided that the expiration of the EPCA was to signal the end of any state regulation of intrastate gasoline prices. Such legislation would have followed comprehensive investigation and serious debate. Congress failed to legislate preemption. In fact, the EPCA contained a preemption clause, which Congress allowed to expire. These facts should constitute sufficient ground for holding that traditional state authority to set wholesale and retail gasoline prices reverted to the States upon the expiration of the EPCA.

II. INFERRING PREEMPTION FROM CONGRESSIONAL DEREGULATORY PHILOSOPHY UNDERMINES THE ABILITY OF STATE GOVERNMENTS TO ADDRESS STATE ECONOMIC PROBLEMS.

The philosophical linchpin of both the district court's and TECA's decision was the determination that, since Congress determined to lift federal controls on retail gasoline prices in order to promote the workings of the "free market," all States must be precluded from entering that regulatory field. Yet, our federal system permits another alternative to the "free market" or national regulation. State power over local economic issues has afforded a third opportunity for problem-solving.

Only if there is a problem on a national level need the federal legislative apparatus be called upon to respond.

Nationwide uniformity in economic philosophy is undesirable not only generally, but it is particularly inappropriate for Puerto Rico. A cursory look at Puerto Rico's economy shows that its per capita income for fiscal 1986 (July 1, 1985-June 30, 1986) was $4,549,[15] while the per capita income for calendar 1986 was $14,641 in the United States as a whole and $9,716 in Mississippi, the lowest State.[16] Unemployment in Puerto Rico was 18.9% in calendar 1986, compared to the 7% average for the United States, and 13.1% in Louisiana, the highest State.[17] The value of imports in Puerto Rico in fiscal 1986 was $18,625,000,000, *exceeding* its gross product, valued at $15,794,000,000.[18] This reliance on imports, especially when coupled with low income and high unemployment, might well dictate an economic philosophy, including price controls on gasoline, different from that of a more affluent State. And this Court has specifically held that the retail gasoline business is not inherently of such national concern that it cannot be regulated, intrastate, by a single State. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 128 (1978).[19]

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[15] Informe Economico al Gobernador, Junta de Planificacion de Puerto Rico [Economic Report to the Governor, The Puerto Rico Planning Board, 1986], Table 1, p. A-1 (1986).

[16] Department of Commerce, Bureau of Economic Statistics, Survey of Current Business (August 1987).

[17] Department of Labor, Bureau of Labor Statistics, Publication 87-67, State Unemployment in 1986 (February 20, 1987).

[18] Informe Economico, *supra* n.15, Tables 1 and 2, pp. A-1 and A-2.

[19] "Finally, we cannot adopt appellants' novel suggestion that because the economic market for petroleum products is nationwide, no State has the power to regulate the retail marketing of gas." 437 U.S. at 128.

The dissent of Justice Brandeis in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), so elegantly stated the reasons for sustaining state regulatory power that it has been cited in both majority and dissenting opinions of this Court ever since.[20] In *New State Ice*, the Court held that an Oklahoma law prohibiting the sale of ice without a license, enacted in order to decrease the "free market" supply of ice, was an invalid infringement upon citizens' due process rights to engage in ordinary business (*id.* at 277-79). Justice Brandeis' dissent took, as a starting place, the relationship of the ice business to core state agricultural and industrial businesses. He explained why the Oklahoma legislature determined that unregulated competition ultimately led to insufficiency of ice production, and consequent harm to business dependent upon that sufficiency, and then stated:

> In considering these matters we do not, in a strict sense, take judicial notice of them as embodying statements of uncontrovertible facts. Our function is only to determine the reasonableness of the legislature's belief in the existence of evils and in the effectiveness of the remedy provided.

Id. at 286-87. He concluded, rhetorically:

> Can it be said in the light of these facts that it was not an appropriate exercise of legislative discretion to authorize the Commission to deny a license to enter the business in localities where necessity for another plant did not exist? The need of some remedy for the evil of destructive competition, where competition existed, had been and was widely felt.

Id. at 300.

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[20] *See, e.g., Chandler v. Florida*, 449 U.S. 560, 579 (1981); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980); *Whalen v. Roe*, 429 U.S. 589, 597 n.20 (1977); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973); *Fay v. New York*, 332 U.S. 261, 296 (1947); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 568 n.13 (1985) (Powell, J., dissenting); *Santosky v. Kramer*, 455 U.S. 745, 773 (1982) (Rehnquist, J., dissenting).

It was in that context, and in the context of the great depression then engulfing the nation, that Justice Brandeis insisted that States must and do have the power to experiment with economic theories and programs. The issue of state power to bridle the free market was at the core of *New State Ice*, and the Brandeis words as to the necessity to promote state experimentation [21] arose precisely in the context of the debate over free market versus state control:

> The long-continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices and a volume of economic losses which threatens our financial institutions. Some people believe that the existing conditions threaten even the stability of the capitalistic system. Economists are searching for the causes of this disorder and are reëxamining the bases of our industrial structure. Business men are seeking possible remedies. Most of them realize that failure to distribute widely the profits of industry has been a prime cause of our present plight. But rightly or wrongly, many persons think that one of the major contributing causes has been unbridled competition. Increasingly, doubt is expressed whether it is economically wise, or morally right, that men should be permitted to add to the producing facilities of an industry which is already suffering from over-capacity. . . . All agree that irregularity in employment—the greatest of our evils—cannot be overcome unless production and consumption are more nearly balanced. Many insist there must be some form of economic control. . . . We have been none too successful in the modest essays in economic control already entered upon. The new proposal involves a vast extension of the area of

[21] "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." 285 U.S. at 311.

> control. Merely to acquire the knowledge essential as a basis for the exercise of this multitude of judgments would be a formidable task; . . . Yet the advances in the exact sciences and the achievements in invention remind us that the seemingly impossible sometimes happens. . . . *There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.*

Id. at 306-11 (emphasis supplied).

An agency of the Puerto Rico Government determined that the "free market" was not working in Puerto Rico in 1985 and 1986 as it should have to bring down the price of gasoline to the proper level, given world prices. That decision was peculiarly within Puerto Rico's legislative competence. *See Exxon Corp. v. Governor of Maryland, supra*; *Nebbia v. New York, supra.* A determination by the federal judiciary that such regulation is now beyond Puerto Rico's control because of a congressional decision to release federal controls has no place in our system of shared power. The decision below would impose on all States one currently favored economic philosophy; in so doing, it totally erodes the advantages of federalism in the realm of economic experimentation.

III. TECA ERRED IN CONCLUDING THAT *TRANSCO* OVERRULED *TULLY v. MOBIL OIL.*

TECA held that *Transco* required a new look at whether "Congress intended to allow the states to step in and assume price control authority over gasoline," an issue that it conceded would otherwise have been foreclosed by *Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982).[22] It thus interpreted *Transco* as requiring an affirmative congressional intention to permit the States to resume the exercise of their traditional powers after federal deregulation. TECA also interpreted *Transco* as mandating that

[22] 811 F.2d at 1516.

whenever the congressional motive is to rescind federal price controls in order to allow the free market to set certain prices, all federal deregulation undertaken for the same purpose henceforth bars state regulation of those prices. *Amici* believe that *Transco* did not stand for either proposition. So applying it expands this Court's preemption doctrines far beyond their present contours.

In *Transco*, this Court did not change or indeed even revisit the holding of *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981), in which the starting place for an investigation of Congress's intention was stated to be "the basic assumption that Congress did not intend to displace state law."[23] Instead, the *Transco* Court explored in detail the context in which the Natural Gas Act of 1938 had been amended in 1978 by the Natural Gas Policy Act. The Court had held, in *Northern Natural Gas Co. v. State Corporation Comm'n*, 372 U.S. 84 (1963), that a state regulation affecting natural gas prices at the wellhead, a regulation "virtually identical" to that involved in *Transco* (474 U.S. at 411), was preempted by the Natural Gas Act. The issue in *Transco* was whether the 1978 amendments, which removed the Federal Power Commission's authority to set wellhead rates, for the express purpose of allowing those rates to be set by supply and demand, but otherwise left virtually intact federal regulation of natural gas from producer through pipeline to consumer, allowed States to fill the wellhead price regulatory void. *Transco* held that they did not. This Court's conclusion was made with reference to the continuing pervasive system of federal regu-

[23] *Accord, Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *See also California Fed. Sav. & Loan Ass'n v. Guerra*, 107 S.Ct. 683 (1987); *R.J. Reynolds Tobacco Co. v. Durham County*, 107 S.Ct. 499 (1986); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 633-34 (1981).

lation. It plainly lends no support to the general proposition that every federal deregulatory action is inconsistent with the resumption of state regulation.

TECA (and the district court below) assumed that the "carefully orchestrated" termination of the federal program of gasoline price control and the transition to a federally non-regulated status was itself sufficient evidence of congressional intent to bar all state regulation (811 F.2d at 1517). The conclusion that a federal decision to discontinue regulation automatically bars, on preemption grounds, revival of state regulatory authority finds no support in *Transco*. If sustained here, it would radically alter the traditional judicial standard of testing preemption that starts with "the basic assumption" that Congress left state power intact. Since *Transco* did not overrule *Tully*, either directly or by implication, the *Tully* ruling stands firm. The expiration of federal gasoline price controls in September 1981 left decisions regarding the necessity of such controls on intrastate prices back where they rested prior to the institution of the federal program, namely, with each of the States and with the Commonwealth of Puerto Rico.

CONCLUSION

For the above reasons, the judgment of the Temporary Emergency Court of Appeals should be reversed.

Respectfully submitted,

AMY LOESERMAN KLEIN
SHORT, KLEIN & KARAS, P.C.
1101 30th Street, N.W.
Suite 303
Washington, D.C. 20007
(202) 342-3000
Of Counsel

BENNA RUTH SOLOMON
Chief Counsel
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the
Amici Curiae

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AMICUS CURIAE

BRIEF

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No. 86-1406

IN THE

Supreme Court of the United States

October Term, 1986

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,

Petitioners,

against

ISLA PETROLEUM CORPORATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

Brief of the States of New York, Connecticut, Maine, Maryland, Mississippi, New Jersey, Oregon and Pennsylvania, and the National Association of State Energy Officials, as *Amici Curiae* in Support of Petitioners

ROBERT ABRAMS
Attorney General of the State of New York
The Capitol
Albany, NY 12224
(518) 474-3197

O. PETER SHERWOOD
Solicitor General
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

FRANK K. WALSH
Assistant Attorney General of Counsel

(Additional List of Counsel on Inside Cover)

JOSEPH I. LIEBERMAN
Attorney General of Connecticut
30 Trinity Street
Hartford, Connecticut 06106

JAMES E. TIERNEY
Attorney General of Maine
State House
Augusta, Maine 04330

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
MICHAEL F. BROCKMEYER
Assistant Attorney General in Chief, Antitrust Division
7 North Calvert Street
Baltimore, Maryland 21202

EDWIN LLOYD PITTMAN
Attorney General of Mississippi and Counsel to State Oil and Gas Board
P.O. Box 220
Jackson, Mississippi 39205

W. CARY EDWARDS
Attorney General of New Jersey
Richard J. Hughes Justice Complex
CN112
Trenton, New Jersey 08625

DAVE FROHNMAYER
Attorney General of Oregon
200 Justice Building
Salem, Oregon 97310

LEROY S. ZIMMERMAN
Attorney General of Pennsylvania
Strawberry Square
Harrisburg, Pennsylvania 17120

JEFFREY C. GENZER
General Counsel
National Association of State Energy Officials
1615 M Street, N.W.
Suite 800
Washington, DC 20036

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Brief of the States of New York, Connecticut, Maine, Maryland, Mississippi, New Jersey, Oregon and Pennsylvania, and the National Association of State Energy Officials, as *Amici Curiae* in Support of Petitioners

INTEREST OF THE AMICI

This brief *amicus curiae* is submitted by the States of New York, Connecticut, Maine, Maryland, Mississippi, New Jersey, Oregon and Pennsylvania, and the National Association of State Energy Officials. These states are concerned that the holding of the Temporary Emergency Court of Appeals (TECA) that the Emergency Petroleum Act of 1973 (EPAA), 15 U.S.C. § 751, *et seq.*, an expired federal statute, preempts all state legislation in the area regulated by the EPAA before its expiration may have the effect of rewriting a substantial body of Supremacy Clause jurisprudence and altering the basic presumption that the police powers of the states are not preempted unless that is the clear and manifest purpose of Congress. In particular, the State of New York is concerned that TECA's holding may prevent enforcement of its "anti-price gouging" statute, N.Y. Gen. Bus. Law § 396-r (McKinney 1984), to the extent that such statute seeks to prevent the imposition of excessive prices for essential consumer goods or services, such as home heating oil, during periods of abnormal disruption of the market.[1] The National Association of State Energy Officials is concerned that the decision below could severly hamper the ability of the states to address local, regional or national energy disruptions.

ARGUMENT

State law may not be preempted by the expiration of a temporary act of Congress.

1. In 1973, Congress enacted the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. § 751, *et seq.* Section 4(a) of the EPAA directed the President to promulgate a

[1] *Amici* take no position as to the wisdom of the particular regulations at issue in this matter.

regulation providing for the mandatory allocation of crude oil, residual fuel oil and refined petroleum products in the amounts and at the prices specified in such regulation. 15 U.S.C. § 753(a). Section 6(b) of the EPAA provided that the regulation promulgated under section 4(a) shall preempt any provision of State or local law providing for the allocation of crude oil, residual fuel oil or refined petroleum products to the extent that such a provision is in conflict with the regulation. 15 U.S.C. § 755(b).

On December 22, 1975, Congress enacted the Energy Policy and Conservation Act (EPCA), Pub. L. No. 94-163, 89 Stat. 871, amending section 18 of the EPAA, which provided, *inter alia,* that the President's authority to promulgate the regulation under section 4(a) of the EPAA shall expire at midnight September 30, 1981. 15 U.S.C. § 760g.

2. In *Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982), ten oil companies challenged a New York State law which imposed a two percent tax on the gross revenues of oil companies limited to their revenues derived from their activities in the State, and prohibited the companies from passing on the cost of the tax in the prices of their products sold in New York, N.Y. Tax Law § 182(12), 1980 N.Y. Laws, ch. 271, § 3, *renumbered by* 1981 N.Y. Laws, ch. 103, § 75, *repealed by* 1983 N.Y. Laws, ch. 18, § 3, on the ground that the antipassthrough provision was in conflict with and therefore preempted by section 6(b) of the EPAA, 15 U.S.C. § 755(b). The District Court agreed with this contention and enjoined enforcement of the antipassthrough provision, and TECA affirmed. *Mobil Oil Corp. v. Tully,* 499 F. Supp. 888 (N.D.N.Y. 1980), *aff'd,* 653 F.2d 497 (Temp. Emer. Ct. App. 1981), *vacated and remanded,* 455 U.S. 245 (1982). This Court, deciding the matter after the expiration of the President's authority under the EPAA, vacated the District Court's injunction

and remanded the case to TECA for consideration of the effect of the expiration of federal price control authority on the oil companies' legal authority to pass through to consumers taxes that were paid or accrued prior to October 1, 1981. *Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982).

In vacating the District Court's injunction, this Court stated as follows:

> The expiration date for the federal statute has come and gone; the only barrier to the enforcement of the antipassthrough provision no longer exists. However, the injunction entered by the District Court did not terminate on October 1, 1981, the date that TECA acknowledged to signal the end of federal concern in the area. Thus, in its present form the declaration of the invalidity of the antipassthrough provision and the accompanying injunction against enforcing it have no current validity and must be set aside.

455 U.S. at 247 (footnote omitted).

3. In this matter, TECA stated that although *Tully* appears to answer the question of whether the regulations at issue are preempted by the expired provisions of the EPAA, *Tully* is not dispositive for two reasons: (1) the context of the appeal to the Supreme Court in *Tully* indicates that the Court's statement was dictum; and (2) the Supreme Court's recent decision in *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board*, 474 U.S. 409 (1986), indicates that the question to be determined is whether, by removing federal price control authority, Congress intended to allow the states to step in and assume price control authority over gasoline. *Isla Petroleum*

Corp. v. Puerto Rico Department of Consumer Affairs, 811 F.2d 1511, 1516 (Temp. Emer. Ct. App. 1986). TECA then held that a review of the legislative history underlying the gradual phase-out of federal price control authority indicated that, in accordance with *Transcontinental*, Congress did not intend to allow the states to step in and assume such authority and that, therefore, the decision to forego regulation implies an authoritative federal determination that the area is best left unregulated, thereby preempting any regulation in this area by the states. 811 F.2d at 1516-17, 1519.

4. This case presents a critically important issue concerning state-federal relations. The decision of the court below constitutes an unwarranted usurpation of the authority of states and upsets the administration of important state laws. *See, e.g.*, Conn. Gen. Stat. § 21a-78a (1987); Me. Rev. Stat. Ann. tit. 10, § 1105 (1980); N.J. Stat. Ann. § 56:6-2 (West 1987); N.Y. Gen. Bus. Law § 396-r (McKinney 1984). The decision cannot be supported, as TECA sought to do, by reference to a now expired temporary statute and is plainly inconsistent with precedent in this Court.

Federal law may preempt state law under the Supremacy Clause of the Constitution in one of three ways. First, Congress may preempt state law by stating so in express terms. *California Federal Savings & Loan Association v. Guerra*, 107 S. Ct. 683, 689 (1987); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Second, Congress' intent to preempt all state law in a particular area may be inferred where the scheme of federal regulation is so comprehensive that it "occupies the field", leaving no room for supplementary state regulation. *See International Paper Co. v. Ouellette*, 107 S. Ct. 805, 811 (1987); *California Federal Savings & Loan*

Association v. Guerra, 107 S. Ct. at 689; *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. at 713; *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218, 230 (1947). Third, where Congress has not completely displaced state law in a particular area, state law may be preempted to the extent it actually conflicts with federal law. *California Federal Savings & Loan Association v. Guerra*, 107 S. Ct. at 689; *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. at 713. Such a conflict occurs either because compliance with both federal and state regulations is a physical impossibility, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or because the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the federal law. *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. ____, 107 S. Ct. 499, 507 (1987); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

In determining whether a state statute is preempted by federal law, a court must give primary emphasis to the ascertainment of Congressional intent. *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. at ____, 107 S. Ct. at 507; *Rice v. Santa Fe Elevator Co.*, 331 U.S. at 230. Absent a clear manifestation of congressional intent to preempt state legislation in a particular field, it will not be presumed that state law is preempted. *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 413 (1973), quoting *Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952); *accord, Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. at 715; *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

In this matter, TECA effectively reversed the presumption that state law is not preempted by stating the question presented as follows:

> [W]e must determine whether by removing federal price control authority Congress intended to allow the states to step in and assume price control authority over gasoline.

811 F.2d at 1516. The sole basis for TECA's reversal of this well-established presumption, as well as its determination that *Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982), was not dispositive of this matter, was its interpretation of certain language contained in *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board*, 474 U.S. 409 (1986). *Amici* submit that the language relied upon by TECA was read totally out of context and without regard to the line of cases from which this language evolved. A brief analysis of this line of cases reveals that the lower court's holding in this matter is manifestly erroneous.

In *Transcontinental*, this Court considered whether its holding in *Northern Natural Gas Co. v. State Corporation Commission*, 372 U.S. 84 (1968), which struck down, on preemption grounds, a state's "ratable-take" order, had been altered by the enactment of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. § 3301 *et seq.*, because the NGPA had removed the jurisdiction of the Federal Energy Regulatory Commission (FERC) over the wellhead sales of "high cost" natural gas. In holding that the "ratable-take" order was preempted by the NGPA, this Court noted that the NGPA does not constitute a federal retreat from a comprehensive gas policy. 474 U.S. at 421. Indeed, the NGPA is a comprehensive statute under which the new federal role is to oversee a national market price regulatory scheme. *Id.* Moreover, while Congress restricted FERC's regulatory authority over particular aspects of wellhead sales, the FERC continues to have substantial concerns with the purchasing practices of the pipelines, one of the elements preempting ratable-take

orders under *Northern Natural Gas.* Thus, while passage of the NGPA constituted a decision that some aspects of natural gas regulations were to be reduced, it was not an invitation for more state regulation. Therefore, state regulation in those areas remained preempted. 474 U.S. at 422-23.

It was within this context that this Court stated that the proper question was not whether FERC had regulatory power over wellhead sales of gas, but whether Congress, in revising this comprehensive federal regulatory scheme aimed at giving market forces a more significant role, intended to give the states the power it had denied FERC. This question was answered in the negative for two reasons. First, under this comprehensive scheme, when Congress meant to vest additonal power in the states it did so explicitly. Second, although FERC's jurisdiction over the relationship between the purchasers' cost structures and the eventual costs to wholesale customers had been curtailed, that relationship was still a subject of deep federal concern. 474 U.S. at 422. Thus, Congress' failure to regulate in certain areas within the field was not to be viewed as creating a void in which the states were free to regulate, but rather as an authoritative federal determination that these areas should remain unregulated.

The differences between *Transcontinental* and this case are obvious. *Transcontinental* involved an area that remained subject to a comprehensive federal regulatory scheme, even though certain aspects of regulation were reduced. Thus, the presumption that state laws are not preempted absent clear congressional intent to the contrary was sufficiently overcome because the field remained occupied. Here, by contrast, there is no comprehensive federal regulatory scheme governing the field. Indeed, the only federal regulation of the field was a temporary

emergency measure that has been permitted to expire and which, prior to its expiration, preempted state law only to the extent it conflicted with the regulation promulgated thereunder. *See* 15 U.S.C. § 755(b). There is simply no basis for concluding that Congress, by permitting the expiration of EPAA when the emergency with which it was designed to deal ended, preempted an area left to regulation or control by the states prior to the emergency. Indeed, no authority exists for such congressional preemption of a field it has chosen not to regulate.

Analysis of the case law antedating *Transcontinental* further indicates that there is no support for TECA's holding in this matter. In *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission,* 461 U.S. 375 (1983), referred to in *Transcontinental,* 474 U.S. at 422, this Court stated by way of dictum that a federal decision to forego regulation in a given area might imply a decision that the area is best left unregulated.[2] 461 U.S. at 384. In that case, however, the Court held that the language, policy and history of the Federal Power Act did not suggest such a conclusion with respect to rural electric cooperatives which Congress chose not to regulate. As noted by the Court, Congress' intent in enacting that law was to fill the regulatory gap created by *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co.,* 273 U.S. 83 (1927), with respect to wholesale transactions of privately-owned electric and gas utilities

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[2]In support of this statement, the Court cited *NLRB v. Nash-Finch Co.,* 404 U.S. 138 (1971), and *Fidelity Federal Savings and Loan Association v. De la Cuesta,* 458 U.S. 141 (1982). In the former case, preemption was based on the occupation of the field by the National Labor Relations Act. 404 U.S. at 144. In the latter case, preemption was based on a state law's conflict with a federal regulation. 458 U.S. at 155. Neither case supports TECA's holding in this matter finding preemption from a total federal withdrawal from the field.

engaged in interstate commerce. 461 U.S. at 384. Congress' decision not to regulate rural electric cooperatives did not evidence an intent to preempt state regulation in that area.[3] *Id.* Thus, this case does not support TECA's holding in this matter.

The decisions of this Court uniformly have indicated that a determination that state law is preempted can only be made with reference to existing federal legislation. *See, e.g., Louisiana Public Service Commission v. Federal Communications Commission,* 106 S. Ct. 1890, 1898 (1986); *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977). Indeed, it is only with reference to existing federal legislation that a court can determine whether Congress, explicitly or implicitly, intended to preempt all state law in a given area, or any state law which may conflict with existing federal regulation in a given area. Thus, there can be no preemption of state law where Congress has not enacted legislation which indicates an intent to preempt state law in a given area or where Congress has permitted legislation which preempted conflicting state law to expire.

It is assumed that federal law does not preempt the exercise of the historic police powers of the states unless that is the clear and manifest purpose of Congress. *Rice v. Santa Fe Elevator Co.,* 331 U.S. 218, 230 (1947). This assumption assures that the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts. *Jones v. Rath Packing Co.,* 430 U.S. at 525. TECA's decision in this matter, however, reverses this assumption and upsets the federal-state balance. If the

[3]Where extensive regulations have been made, state regulation of a separable or distinct segment of the matter covered by federal statute is not preempted unless it is clear that the absence of federal regulation of this segment "takes on the character of a ruling that no regulation is appropriate or approved". *Bethlehem Steel Co. v. New York State Labor Relations Board,* 330 U.S. 767, 774 (1947).

courts are permitted to divine intent from Congress' inaction, the states will be forever hindered in regulating areas in which Congress is authorized to act, but has chosen not to do so. Under TECA's holding in this matter, there are no consistently applicable guidelines for ascertaining whether Congress, in failing to exercise its delegated powers by enacting legislation, has ordained that state law is preempted in a given area. Such a holding clearly is inconsistent with the concept of federalism, as well as the spirit, if not the letter, of the substantial body of case law announcing and refining preemption doctrine.

It is clear that in connection with the expiration of the EPAA, Congress could have enacted legislation providing that the states are preempted from regulating in the area of gasoline prices. Had such legislation been enacted, a court would have no problem in ascertaining congressional intent to preempt sufficient to overcome the standard presumption against preemption in accordance with the substantial body of preemption case law. Absent such legislation, however, the case law commands that state regulation in this area is not preempted. *See California Coastal Commission v. Granite Rock Co.,* 107 S. Ct. 1419, 1425 (1987), quoting *Kleppe v. New Mexico,* 426 U.S. 529, 543 (1976). If Congress intended otherwise, it can and should be required to enact legislation which expresses this intent. *Cf. Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission,* 461 U.S. at 387 n.11 ("[t]he relevant inquiry, however, is not whether Congress authorized or expected such regulation, but whether it intended by its own actions to *forbid* it) (emphasis in original). A requirement that Congress act affirmatively to express its intent is consistent with existing case law and the concept of federalism.

TECA's holding is unprecedented. No case has been found which indicates that state law is preempted following Congress' withdrawal from a particular field. Indeed, we submit that, absent any congressional declaration that the states are forever precluded from enacting petroleum product price controls, Congress' withdrawal should be viewed as clear evidence of an intent not to preempt. *Cf. Pennsylvania v. Nelson,* 350 U.S. 497, 502 (1956) (State sedition laws not preempted between time Congress abandoned field in 1921 and reentered field in 1940). The decision below represents an extraordinary departure from existing law, permitting preemption from congressional inaction with respect to an entire field. Moreover, to the extent that TECA's decision was based upon its ascertainment of Congress' general overall intent, and not upon a specific federal statute with which the regulations are claimed to conflict, it is contrary to existing law. *Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 634 (1981) ("it is necessary to look beyond general expressions of 'national policy' to specific federal statutes with which the state law is claimed to conflict"). Accordingly, TECA's judgment in this matter should be reversed.

CONCLUSION

The judgment of the temporary emergency Court of Appeals should be reversed.

Dated: Albany, New York
November 19, 1987

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of New York
The Capitol
Albany, New York 12224
(518) 474-3197

O. PETER SHERWOOD
Solicitor General
Counsel of Record

PETER H. SCHIFF
Deputy Solicitor General

FRANK K. WALSH
Assistant Attorney General

of Counsel

AMICUS CURIAE

BRIEF

No. 86-1406

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,
Petitioner,

v.

ISLA PETROLEUM CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the Temporary Emergency Court Of Appeals

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BRIEF OF THE NEW ENGLAND FUEL INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

DAVID GINSBURG
JOHN H. ZENTAY
GARY J. KLEIN
IRA T. KASDAN
GINSBURG, FELDMAN AND BRESS, CHARTERED
1250 CONNECTICUT AVENUE, N.W.
WASHINGTON, DC 20036
(202) 637-9094

CASILLAS PRESS INC. – 1717 K STREET NW WASHINGTON DC 20036 – 223-1220

QUESTIONS PRESENTED

1. Does the federal policy of free market pricing for petroleum products during periods of ample supply, enacted and implemented by EPCA and reaffirmed in subsequent enactments, preempt a state regulation that directly controls the price of gasoline?

2. Does Transcontinental Gas Pipe Line Corp. v. State Oil Gas Board, 474 U.S. 409 (1986), hold that a federal statutory policy of deregulation has the same preemptive force and effect as a federal regulatory enactment?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

No. 86-1406

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, et al.,
Petitioners,

v.

ISLA PETROLEUM CORPORATION, et al.,
Respondents.

On Writ of Certiorari to the
Temporary Emergency Court of Appeals

BRIEF OF THE NEW ENGLAND FUEL INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The New England Fuel Institute ("NEFI") is the largest association of heating oil distributors in the United States. NEFI members are primarily retail and wholesale fuel oil distributors that do business in one or more of the New England states. A substantial number of NEFI members operate in more than one state, and their petroleum products are transported across state lines daily. NEFI's more than 1300 members are concerned that a reversal of the decision below would spawn state and local legislation to regulate and control the price and distribution of petroleum products in areas where NEFI members operate. Such regulation would necessarily interfere with market mechanisms, the preservation

of an economically sound petroleum industry and national energy security policy.

In New England, the distribution of petroleum products is inherently a matter of interstate commerce. Petroleum products are frequently brought by pipeline into Connecticut, then shipped by truck to smaller terminals in Connecticut, Rhode Island and Massachusetts, then sold to retailers for distribution in those states and others. Similarly, petroleum products brought into Boston Harbor by ocean tanker are often then shipped by barge to distributors in Massachusetts, Rhode Island, New Hampshire and Maine. Even products held by a wholesaler in a terminal in one state are often distributed by retailers in several.

Thus, petroleum price control or distribution regulations of a single state, enacted on behalf of its citizens, could significantly interfere with the distribution of petroleum products throughout New England.

For example, if Massachusetts enacted a law that required terminal facilities in that Commonwealth to supply all needs of Massachusetts consumers before allocating products to out-of-state consumers, the result could be chaotic. Similarly, if Massachusetts prevented a petroleum distributor from earning a free market profit margin on its sales within Massachusetts -- just as Puerto Rico has done here -- the distributor would likely increase its prices to consumers in other states, in order to recoup the lower profit margin

permitted in Massachusetts. Clearly, those states with major petroleum ports and significant terminal facilities could "protect" their citizens, but at the expense of citizens from neighboring states, and to the detriment of the national policy of free market pricing for petroleum products. Ultimately, these are the inevitable consequences of the Puerto Rico regulation under review here.

We do not ask the Court to hold that the Puerto Rico regulations burden interstate commerce because that issue is not before the Court. Instead, we urge the Court to hold that Congress, in enacting the Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 871, as well as the Department of Energy Organization Act,

Pub. L. No. 95-91, 91 Stat. 565 (1977), the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 229, the Energy Emergency Preparedness Act of 1982, Pub. L. No. 97-229, 96 Stat. 248, and the Energy Policy and Conservation Act Amendments of 1985, Pub. L. No. 99-58, 89 Stat. 941, has established a comprehensive federal regulatory/deregulatory scheme for petroleum pricing and allocation. Because of the nature of the federal interest in this issue, as expressed in these statutes, any state regulation governing pricing or allocation of petroleum products conflicts directly with the federal scheme that exists today. Amicus urges the Court to recognize that federal energy deregulatory law is entitled to

the same preemptive effect as federal energy regulatory law.

If the Court concludes that the Puerto Rico regulations are not preempted by the foregoing enactments, Amicus urges the Court to note that it has not considered whether these regulations burden interstate commerce, or whether comparable regulations by a state on the mainland would violate the Commerce Clause.

STATEMENT OF THE CASE

The critical fact before the Court is that the Puerto Rico Department of Consumer Affairs ("DACO") has ordered restrictions on the prices that may be charged and the wholesale profit margins that may be earned by gasoline distributors. P.R. Laws ANN. Tit. 237,

P.R. Laws ANN. Tit. 3 § 341e; P.R. DACO Price Reg. No. 45, Amend. No. 1 (1976). The restrictions would apply to gasoline wholesalers whether they purchased their products in or out of Puerto Rico, and whether or not they serve customers in other states. DACO issued these orders on the assumption that its authority to regulate petroleum prices is identical to its authority prior to the enactment of the Emergency Petroleum Allocation Act of 1973, Pub. L. 93-159, 87 Stat. 628 (codified as amended at 15 U.S.C. §§ 751-760g. (1982)) ("EPAA"). We believe that assumption is in error.

The present federal interest in this subject is not what it was prior to 1973. Petitioners and their amici believe that federal legislation governing petroleum pricing existed only

during a temporary period of oil shortages that existed during the 1970s. They would have the Court equate the federal interest in petroleum price and allocation regulation with the federal interest articulated in temporary emergency price control statutes enacted during wartime, such as the Emergency Price Control Act of 1942, Ch. 26, 56 Stat. 23, former U.S.C. App. § 901, et seq., (World War II) and the Defense Production Act of 1950, Ch. 932, 64 Stat. 798, former U.S.C. App. § 210 et seq. (Korean War). Those statutes reflected a temporary and emergency federal interest in controlling prices and preventing inflation, an interest that ended with the end of emergency conditions. Indeed, those statutes may have provided a sound precedent for the

scope of federal preemption of petroleum pricing under EPAA if EPAA had expired, pursuant to its original term, in 1975.

If Congress had permitted the EPAA to expire, as originally contemplated, it may have reflected an intent to terminate federal policies, remove the federal system of price and allocation controls and "return" to the passive federal role that existed in this area prior to the imposition of federal controls. However, Congress continued and expanded its intervention when it amended EPAA in December, 1975. It did not simply extend the term of federal price controls, as it had done twice earlier that year. Congress and the President engaged in a full year of debate concerning a permanent oil pricing policy and ultimately agreed to

a compromise embodied in the Energy Policy and Conservation Act of 1975 ("EPCA") Pub. L. No. 94-163, 89 Stat. 871.

Congress did not simply phase-out federal price controls. ECPA explicitly enacted an affirmative federal deregulation policy; pursuant to this statute price controls on all petroleum products were removed by action of the Executive during the period when federal price control authority remained in effect. The decontrol of these petroleum products were affirmative acts of the federal government duly authorized pursuant to EPCA. These affirmative acts of deregulation cannot fairly be equated with the expiration of federal authority following a temporary national emergency.

Moreover, the federal policy of maintaining a petroleum market free of all government price controls is affirmatively manifested by statutes other than EPAA which are still in effect. The Court is obligated to consider the federal policies of free market pricing for petroleum set forth in the provisions of EPCA that did not amend EPAA, as well as the Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 229, the Energy Emergency Preparedness Act of 1982, Pub. L. No. 97-229, 96 Stat. 248, and the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977). These statutes, taken singly or together, reflect an unambiguous congressional intention that national energy and security interests are best

served by free market pricing of petroleum products in times of stable supply. State or local control of petroleum product prices or distribution patterns necessarily conflicts with this comprehensive federal scheme. We submit that the Puerto Rico regulations are preempted, and the judgment below should be affirmed.

ARGUMENT

I. THE PUERTO RICO GASOLINE PRICE CONTROL REGULATION IS PREEMPTED BECAUSE IT CONFLICTS WITH THE PROVISIONS AND OBJECTIVES OF FEDERAL LAW

A. In Ascertaining the Policies and Objectives of Congress, the Court Must Consider EPCA and Subsequent Legislation

"The purpose of Congress is the ultimate touchstone" which determines whether the DACO orders are preempted by

federal law. Malone v. White Motor Corp., 435 U.S. 497, 504 (1978) quoting Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963). If the DACO regulatory scheme "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. 52, 67 (1941), it must be set aside.

Congressional intent to preempt petroleum price controls such as those of DACO need not have been stated explicitly:

> Congress' intent to suspend state laws altogether may be inferred because . . . the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.

Fidelity Federal Savings & Loan Ass'n. v. De La Cuesta, 458 U.S. 141, 153 (1982)

quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

By the laws it has passed since 1975 -- including but not limited to the Energy Policy and Conservation Act in 1975, the Department of Energy Organization Act in 1977, the Windfall Profit Tax in 1980, the Energy Emergency Preparedness Act in 1982 and the Energy Policy and Conservation Act Amendments in 1985 -- Congress has repeatedly expressed its intent that unregulated allocation and pricing of petroleum is a matter of continuing federal concern.[1/] The DACO regulations conflict with the objectives expressed and programs enacted by

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1/ The Court's dictum in Mobil Oil Corp. v. Tully, 455 U.S. 245 (1982) (per curiam), that federal concern in this area ended on September 30, 1981, is in error. The issue of federal concern was not briefed or argued in that case and the statement therefore, should be given no weight.

Congress in these statutes -- including a coordinated national energy policy based upon a market free of oil price controls, except for specified forms of control in times of declared emergency or shortages.

The Court must compare the objectives of federal law with the effects of the state law to determine whether Puerto Rico's price control regulation "stands as an obstacle to the accomplishment" of federal objectives. Hines, supra, 312 U.S. 52, 67 (1941). In doing so, this Court is not constrained to limit its examination to the specific purposes and objectives of the EPAA, as TECA may have been. EPAA, as amended, may be the central focus of the Court's inquiry, but it is only one part of the comprehensive federal scheme enacted to deal with oil pricing and allocation

during periods of ample supply and periods of disruption. All of these enactments must be considered to determine "the full purposes and objectives of Congress." Id. In any event, it is settled that "subsequent legislation may be considered to assist in the interpretation of prior legislation on the same subject." Great Northern Ry. Co. v. United States, 315 U.S. 262, 277 (1942). See also, FHA v. Darlington, Inc., 358 U.S. 84, 90 (1958).

B. EPCA Established a Comprehensive Federal Policy For Oil Pricing That Clearly Envisioned the Termination of Controls on Crude Oil and Petroleum Products by 1981 Unless Such Controls Were Extended

EPCA is a multi-faceted and comprehensive statute which converted a temporary scheme of regulatory control

into a permanent national policy of supply incentives, demand restraints, and emergency response mechanisms. This policy is expressed clearly in the House report:

> The fundamental reality is that this nation has entered a new era in which energy resources previously abundant, will remain in short supply, retarding our economic growth and necessitating an alteration in our life's habits and expectations. The Arab embargo raised public consciousness of energy problems and underscored more effectively than could any other event the need for policy decisions at the national level. H.R. Rep. No. 94-340, 94th Cong. 1st Sess. at 1.

This Report also makes plain the transformation of federal oil pricing policy to a permanent, decontrolled status:

> The EPAA is transformed from temporary to permanent law in conjunction with conversion of the Act to standby authority. However, since that conversion

> may require some period of time so that the conversion may be accompanied by a smooth transition of petroleum markets from a controlled state to uncontrolled status subject only to standby authority, a complete reevaluation of the Section 4(a) regulation is required to be made. Id. at 58 (emphasis added).

The Senate report accompanying EPCA similarly described the comprehensive nature of the new federal enactment:

> S. 622 . . . provides the authority to deal with situations created by severe energy shortages and creates the foundation upon which a new national energy conservation policy can be built. The programs embodied in this legislation are essential if we are to minimize our dependence on imported energy, protect national security interests and the integrity of our foreign policy and promote sensible energy conservation consistent with economic recovery, full employment and stable prices. S. Rep. No. 94-26, 94th Cong. 1st Sess. at 22.

The Conference Report further explains that EPCA is designed to achieve long term goals:

> In the long run, the Act will decrease dependence on imports, enhance national security, achieve the efficient utilization of scarce resources, and guarantee the availability of domestic energy supplies at prices consumers can afford. S. Rep. No. 94-516, 94th Cong. 1st Sess. at 117.

One of the central features of EPCA's "long run" policies was the gradual establishment of a free market for petroleum pricing by September 30, 1981. Such a free market would provide incentives for production and restraints on demand. There was much controversy surrounding the length of time that should be provided to establish a market based system of petroleum pricing, and the mechanism to achieve that result.

Congress settled on extension of the EPAA because it was the surest and smoothest vehicle for leading to decontrol:

> The conferees believe that the flexibility of the existing law [EPAA] and its demonstrated adequacy during the 1973-74 Arab embargo make it a prime candidate for conversion to a standby authority. The conferees believe that such a conversion would be preferable to enactment of a separate authority. Id. at 204.

Congress clearly envisioned market forces operating unimpeded by government control while standby authority existed:

> Extension of the EPAA and its conversion to standby authority offers, in addition, the potential for a smooth transition of petroleum markets from a closely regulated state to a largely unregulated status subject to standby pricing and allocation authority. Id.

Under the EPCA program, by September, 1981, the federal government's

discretionary authority to reimpose controls would expire. The federal authority to reenter and control petroleum markets was thereby reduced; but it was not eliminated entirely. Remaining authority conferred by EPCA would exist in certain limited situations, authority which remains in effect today.

In several provisions other than the amendments to EPAA, EPCA specifically authorizes the limited federal use of price or allocation control mechanisms. Independent of the oil price standby provisions, EPCA includes two additional standby price control authorities. First, in the event of a drawdown and distribution of the Strategic Petroleum Reserve ("SPR"), the Secretary [of DOE] may provide for

allocation and price control of SPR crude oil, 42 U.S.C. § 6241(e). Second, the President may regulate the price or allocation of petroleum products if "necessary for implementation of the obligations of the United States under [the International Energy Program ("IEP")], 42 U.S.C. § 6271. Significantly, each of these limited authorities to regulate petroleum prices requires that any regulation be "consistent with the attainment, to the maximum extent practicable, of the objectives specified in Section [4(b)(1) of the EPAA]". 42 U.S.C. §§ 6241(e) and 6271(c)(1).

Thus, federal "standby authority" to regulate petroleum prices in the period after September 30, 1981 is included in EPCA and remains extant

today. However, this authority is carefully limited to specific situations of national or international supply disruptions and must meet EPAA objectives. Oil price control authority cannot be exercised by the federal government in the absence of these specific conditions.[2/] In the absence of these specific conditions, the legislated policy relies on the exclusive governance of the market place.

The comprehensiveness of the federal policy enacted by EPCA, which included decontrol of petroleum prices by 1981 as one element, is manifested by

---

2/ Indeed, authority conferred by EPCA on the President to promulgate energy conservation contingency plans specifically prohibits "any provision respecting the price of petroleum products." 42 U.S.C. § 6262(a)(2)(B).

the many interrelated programs the law established. EPCA includes measures to stimulate domestic production of oil, gas and coal, 42 U.S.C. § 6211 et seq.; establishment of a Strategic Petroleum Reserve, 42 U.S.C. § 6231 et seq.; enactment of standby energy authorities, including the promulgation of energy conservation contingency plans, rationing contingency plans, and allocation and price control authorities necessary to fulfill U.S. obligations in the International Energy Program, 42 U.S.C. § 6261 et seq.; a conservation program for consumer products, 42 U.S.C. § 6291 et seq., and for industrial equipment, 42 U.S.C. § 6311 et seq.; the authority to prescribe specific guidelines for development and implementation of state energy

conservation programs, 42 U.S.C. § 6321 et seq.; energy conservation measures to be taken by the federal government, 42 U.S.C. § 6361 et seq.; a specific energy conservation program for schools and hospitals, including specific guidelines and criteria for approval of state plans in this area, 42 U.S.C. § 6371 et seq.; and provisions providing for the development and disclosure of a more comprehensive and accurate energy data base, 42 U.S.C. § 6381 et seq. These federal energy regulatory programs are interdependent and connected parts of an integral whole.

EPCA provisions expire on several different dates, the earliest of which related to the authority of the President to control the pricing or allocation of crude oil or petroleum

products. 15 U.S.C. § 760g. Although certain of the other authorities provided to the President in EPCA have expired, for example, the authority to promulgate energy conservation contingency plans, 42 U.S.C. § 6263(f), many of the provisions of EPCA remain in effect. Some have been specifically extended by the Congress. See Energy Emergency Preparedness Act of 1982, Pub. L. No. 97-229, 96 Stat. 248; Energy Policy and Conservation Act Amendments of 1985, Pub. L. No. 99-58, 99 Stat. 102; extending 42 U.S.C. § 6285 (Energy Emergency Preparedness); and 42 U.S.C § 6251 (SPR Authorities). Therefore, provisions of the EPCA comprehensive program remain "extant" and severely circumscribe the authority of the Executive to regulate petroleum prices.

C. Subsequent Enactments of Congress Also Envisioned a System of Free Market Pricing For Petroleum After September 30, 1981

Within the congressional debates on EPCA we have found no explicit reference to preemption of state price control laws after 1981. Neither have we found any evidence that Congress envisioned the possibility of state price control regulation in harmony with the purposes of EPCA. We believe the role of the states was simply not considered by Congress because it was obvious that a state could not exercise any price regulatory authority before September 30, 1981.[3/] Thus, there was no need for

---

3/ Neither the Federal Energy Administration ("FEA") Findings and Views Concerning the Exemption of Middle Distillates From the Mandatory Petroleum Allocation and Price Regulations (June 15, 1976); the FEA (footnote continued)

Congress to consider the issue of state preemption almost six years in advance. Moreover, federal energy regulatory policy could change before that date; or, alternatively, Congress could decide to extend a broad price regulatory system beyond September 30, 1981.

(footnote continued from previous page) Findings and Views Concerning the Exemption of Residual Fuel Oil From the Mandatory Petroleum Allocation and Price Regulations (March 29, 1976); or the congressional debates concerning approval of these decontrol "Energy Actions" pursuant to EPCA, § 455, 15 U.S.C. § 751 note, contains a reference to the possibility that states could enter the field and regulate prices. Yet, many members of Congress commented that these energy actions would eliminate all controls on prices. See, e.g., "It is time to let market forces reassert themselves." (Mr. Boland) H. 3312 (April 13, 1976); "It will do us no good at all to control the price of crude oil, if a company is permitted to charge whatever it wants for the refined product. This is no control at all." (Mr. Rogers) H. 3313 (April 13, 1976).

In fact, federal energy policy on the subject of decontrol of petroleum markets did not change. By repeated enactments of the Congress and National Energy Policy Plans submitted to Congress by the Executive, the federal policy of free market pricing for petroleum products has been reaffirmed and established as a cornerstone of the nation's energy policy.

1. Department of Energy Organization Act

On August 4, 1977, Congress enacted the Department of Energy Organization Act, 42 U.S.C. § 7101 et seq., ("DOE Act"), which established the Department of Energy ("DOE") to coordinate and administer the nation's new and critical interests in energy policy. Congress found, inter alia,

> (2) . . . our increasing dependence on foreign energy supplies presents a serious threat to the national security of the United States and to the health, safety and welfare of its citizens;
>
> (3) a strong national energy program is needed to meet the present and future energy needs of the Nation consistent with overall national economic, environmental and social goals;
>
> . . . and
>
> (5) formulation and implementation of a national energy program require the integration of major Federal energy functions into a single department in the executive branch. 42 U.S.C. §7111.

The purposes of the DOE Act included the need "(3) to provide for a mechanism through which a coordinated national energy policy can be formulated and implemented to deal with the short-, mid-, and long-term energy problems of the Nation . . . ." 42 U.S.C. §7112. To

implement this purpose, the President was charged with preparing and submitting to Congress a proposed National Energy Policy Plan by April 1, 1979 and biennially thereafter. 42 U.S.C. §7321. The responsible committees of the Senate and House of Representatives were to review the President's proposed plan and recommend changes, if any, to their respective chambers. 42 U.S.C. §7322.

The National Energy Policy Plans of Two Administrations Consider Free Market Pricing of Oil a Central Feature of National Energy Policy

The second National Energy Policy Plan ("NEP II") was submitted by the DOE to Congress on May 7, 1979.[4/] NEP II

[4/] It was in fact the first National Energy Plan submitted pursuant to the DOE Act. President Carter chose to label it the National Energy Plan II, because he had submitted a comprehensive national energy program (footnote continued)

makes clear that a fundamental aspect of the nation's energy policy is the free market pricing of oil in the period after September 30, 1981. For the "near-term" the Plan states:

> the President's decision [to decontrol crude oil] has insured that by 1981 all domestic oil will be priced at its true 'replacement cost' . . . . With a phase-out of price controls, market forces should lead naturally by themselves to more investments in conservation and production. The first task of the near-term strategy is to ensure that such investments are made. NEP II at II-7.

The Plan also makes clear that this policy of deregulation continues for the "mid-term" (1985-2000):

> By 1981, domestic oil prices would rise with world oil prices . . . . First, as a result of the oil pricing policy, U.S. consumers will shift more quickly away from oil to other forms of energy as

(footnote continued from previous page) in 1977. See President's Message of Transmittal (May 7, 1979).

world oil prices rise. . . . After 1985, fuel switching and conservation probably will account for greater import savings than will increased production. NEP II at II-17.

The oil import savings of the President's 1979 program -- that is, decontrol of oil prices and use of the windfall profits to encourage shale oil and solar energy -- depend on the alternatives to which they are compared as well as on the rate at which world oil prices will rise. In all circumstances, however, the President's program will have large positive benefits when compared with continued controls. NEP II at VIII-3.

Table VIII-2 compares the oil import savings of the President's program, with those of two alternative cases: controls continued for an indefinite period and decontrol in 1981 without the windfall profits tax. When compared with continued controls, the President's program would yield oil import reductions that grow to 1.7 to 2.3 MMBD by 1990. NEP II at VIII-4.

Thus, free market pricing of oil was a principal incentive of President Carter's

national policy to encourage conservation and domestic production through the year 2000. The oil import reduction objectives of near and mid-term national energy policy would be unachievable if states were permitted to control the maximum retail prices of petroleum products.

Subsequent National Energy Policy Plans reiterate the national policy of free market pricing for petroleum. The first plan submitted by the Reagan Administration, entitled "Securing America's Energy Future", ("NEP III") explained the existing federal policy of decontrol:

> The President's action to end oil price controls and to dismantle the burdensome regulatory apparatus associated with those controls was a major step in implementing an energy policy focused on market realities. . . .

. . . .

> Price controls actually inhibited efficient energy use and discouraged domestic production. . . . Government regulation encouraged demand by controlling the average price of oil on the U.S. market . . . . The inevitable result was more oil imports, which increased our vulnerability to damage from disruptions in world oil supplies, such as those occasioned by the Iranian revolution and its aftermath. NEP III at 2.

> In time, a bipartisan recognition of the sterility of this approach led to legislation that envisioned the eventual decontrol of energy prices. Now that oil price controls have been ended finally through Presidential initiative . . . Americans generally are using energy more efficiently in response to market forces. NEP III at 3 (emphasis added).

The second National Energy Policy Plan submitted by the Reagan Administration ("NEP IV") reviews the results of the national policy of free

market pricing for petroleum, as well as the need to continue that policy.

> Since 1981, federal programs and actions . . . have led to substantial progress and a reinvigorated national energy system. The following are some of those programs and actions:
>
> Price and allocation controls on crude oil and petroleum products have been removed resulting in increased production of our domestic resources and lower gasoline prices to consumers. NEP IV at 2 (emphasis added).

NEP IV, submitted in October 1983, also explains that market pricing for petroleum is a positive federal program, not simply the absence of a regulatory program:

> An interventionist approach has been abandoned and replaced with increased reliance on the free market to do what no government agency can do -- namely, to promote economic efficiency through innovation, fuel substitution, and development of new technologies. NEP IV at 6 (emphasis added).

The National Energy Policy Plan is the best expression of the Executive Branch view of national energy policy. The Plans prepared by both the Carter and Reagan Administrations, two Administrations that have participated in oil price deregulation, leave unambiguous the central role of free market pricing of petroleum to the nation's energy policy objectives. These Plans consistently state that controls on the price of crude oil or petroleum products directly interfere with national energy policies to stimulate production, encourage conservation, economic efficiency, and fuel substitution, develop new technologies, and, ultimately, limit oil imports to protect and promote national security.

While these Presidents were not involved in the enactment of this deregulation policy, their participation in its implementation gives considerable weight to their views. See Udall v. Tallman, 380 U.S. 1, 16-18 (1965). Indeed, "Congress' failure to repeal or revise in the face of such administrative interpretation has been held to constitute persuasive evidence that that interpretation is the one intended by Congress." Zemel v. Rusk, 381 U.S. 1, 11 (1965).

2. Windfall Profit Tax Act

The Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, 94 Stat. 229, ("WPT") is another law expressing the federal policy of free market pricing for petroleum. The objective of the windfall profit tax is to "recoup" for

the federal treasury a portion of the additional revenues earned by domestic oil producers resulting from the decontrol of crude oil prices by President Carter pursuant to EPCA, and the termination of authority to control petroleum prices on September 30, 1981. President Carter proposed WPT in the same message in which he announced the phase-out of crude oil price controls. See, President's Address to the Nation, "Energy", 15 Weekly Comp. Pres. Doc. 609 (April 5, 1979). Both the Senate and House reports accompanying WPT make clear the nexus between WPT and decontrol.

The House report states:

> The Committee bill . . . imposes a 70 percent windfall profit tax on increases in domestic crude oil prices resulting from the deregulation of crude oil prices or from excessive increases in world oil prices. H.R. Rep. No. 96-304, 96th Cong. 2d Sess. at 2.

The Senate report ties WPT to decontrol even more explicitly:

> The Crude Oil Windfall Profit Tax Act of 1979 is needed because of the Administration's decision to phase out price controls on crude oil, the recent increases in world oil prices, and the nation's continuing overdependence on imported energy. The Finance Committee substitute is intended to tax a fair share of the additional revenues received by oil producers and royalty owners as a result of oil price decontrol in a way that will not adversely affect incentives to produce domestic oil. S. Rep. No. 394, 96th Cong., 1st Sess. at 6 (1979).
>
> Decontrol of oil prices, whether as a result of President Carter's phase out of controls or immediate decontrol in 1981 when the legislative authority for those controls expires, will increase the profits of oil producers and royalty owners significantly. Id. at 27.

The WPT represents a portion of the extant federal law requiring free market oil pricing during normal periods of supply. In enacting this law, Congress

ratified the phase out of oil price controls by September 30, 1981, and the deregulation that would follow.[5] Congress intended WPT to remain in effect and produce revenues based on free market oil prices until at least September 30, 1990.[6] § 4990, 26 U.S.C. § 4990.

In addition, both Houses of Congress calculated the revenues that would likely

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5/ An additional indication that the Windfall Profit Tax Act reflected a federal concern to continue free market pricing is a provision that requires a study and report by the President "no later than January 1, 1983, on the effect of decontrol and the Windfall Profit Tax . . . ." H.R. Conf. Rep. No. 817, 96th Cong. 2d Sess. at 116 (1980).

6/ The Windfall Profit Tax Act incorporates regulations prescribed under the EPAA as they existed in June, 1979. Section 4989, 26 U.S.C. § 4989. Although these EPAA regulations are not currently in effect for the purpose of controlling oil prices, they are in effect for purposes of establishing the appropriate price bases for taxation under the WPT.

be raised during this period, and earmarked these revenues for national energy purposes:

> The Finance Committee substitute . . . also provides for the use of the revenue from the tax to encourage energy conservation, to promote production from alternate energy sources, and to ease the burden of higher energy prices on lower-income households.
>
> Over the period 1979-1990, the Windfall Profit Tax will raise $138.2 billion. S. Rep. No. 394, 96th Cong., 1st Sess. at 1 (1979).
>
> The [Ways and Means] Committee believes that solving the energy problem requires major federal aid for the development of alternative energy sources and new methods of energy conservation. To assure that these expenditures are met, the bill places the revenue from the Windfall Profit Tax in an energy trust fund which will finance the needed energy spending programs. H.R. Rep. No. 304, 96th Cong. 1st Sess. at 8 (1979).

The purposes and objectives of the WPT cannot be fulfilled if states are permitted, during the period it is in

effect, to regulate oil prices at below market levels. Not only would this deny the federal government the revenues it anticipated in enacting the WPT, but it also could directly interfere with the federal government's undertaking to finance critical energy programs.

3. Energy Emergency Preparedness Act of 1982

a. Congressional Findings and Purposes

The Energy Emergency Preparedness Act of 1982 ("EEPA") is the only federal enactment since EPCA dealing specifically with regulation of oil prices. This legislation amends several of the authorities included in EPCA and explicitly states, for the period after September 30, 1981, the federal policy and objective of reliance on market forces to establish petroleum prices.

EEPA amends EPCA by adding several new provisions. Section 271(a), 42 U.S.C. §6281(a), contains Congress' finding that

> "prior to the occurrence of . . . a shortage, the Federal Government has a responsibility to be prepared to mitigate the adverse impacts of such a shortage as a supplement to reliance on free market pricing and allocation of avilable petroleum products." (emphasis added).

In addition, section 271(b), 42 U.S.C. § 6281(b), declares

> that it shall be the policy of the United States that the federal government shall be prepared prior to any shortage of petroleum products to respond to energy emergencies, pursuant to authorities under provisions of law other than this part, as a supplement to reliance on the free market to mitigate the adverse impacts of a shortage of petroleum products on public health, safety, and welfare. (emphasis added).

EEPA thus clarifies and reaffirms that the energy policy of the United States in the period after September 30, 1981, is to rely on free market allocation and pricing of petroleum products, and supplemental authorities, prior to a shortage or a disruption. State regulation of petroleum product prices in the absence of a shortage directly conflicts with this expression of federal purposes.[7/] State laws that

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[7/] The Conference Report to EEPA indicates that Congress was unclear what, if any, state laws in the emergency area were preempted. Congress states that the addition of these amendments to EPCA would not in itself "preempt state laws or programs already in effect or which would become effective after enactment of this part. The authorities of the states to enact laws in anticipation of, or in response to, energy emergencies remain unaffected by this legislation." H. Rep. No. 663, 97th Cong., 1st Sess. at 11. This "disclaimer" language does not alter
(footnote continued)

directly regulate the price of petroleum products during periods of ample supply "stand as an obstacle to the accomplishment and execution" of these explicit "purposes and objectives of Congress." 312 U.S. 52, 67 (1941).

b. Report on Impact of Reliance on Market Forces

In a related expression of congressional intention that federal policy prohibited government controls during a period of ample supply, EEPA also required DOE to submit a "report analyzing the impact on the U.S. economy and U.S. consumers of reliance on the free market to allocate and set prices

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(footnote continued from previous page)
the preemptive effects of EPCA or any other federal energy enactment; it simply states the conferees' view that the amendments added by EEPA have no additional preemptive effect on state legislation dealing with energy emergencies.

for supplies of oil during substantial reductions in available supplies to the United States." § 6, 42 U.S.C. § 6245. Congress' concern as to the impact of reliance on the free market during a supply disruption reflects its view that federal policy during a period of ample supply was accepted to be reliance on market forces.

Moreover, the report submitted by DOE confirms and reaffirms the established EPCA policy of reliance on market forces during periods of ample supply. DOE, "The Domestic Impact of Reliance on Market Forces During A Substantial Petroleum Supply Interruption" (August 3, 1983) at 1, I-4, II-2, II-2.

III. THE CONFLICT WITH THE STATUTORY SCHEME HERE IS GREATER THAN THE CONFLICT THAT EXISTED IN TRANSCO

To allow the DACO regulations to stand, the Court must substantially limit, or overrule, Transcontinental Gas Pipeline Corp. v. State Oil and Gas Board of Mississippi, 474 U.S. 409 (1986), ("Transco"). Transco held that a state regulation that indirectly regulates a deregulated category of natural gas is preempted because the state

> action directly undermines Congress' determination that the supply, the demand and the price of high-cost gas be determined by market forces. To the extent that Congress denied FERC the power to regulate affirmatively particular aspects of the first sale of natural gas, it did so because it wanted to leave that determination of supply and first-sale price to the market. 474 U.S. at 422.

In Transco, the Court divided 5-4 as to whether the state regulation actually

conflicted with federal deregulation policy. However, the Court was unanimous that the state regulation should be preempted if it conflicted with the federal deregulation policy:

> The purpose of the NGPA with respect to high-cost gas is to eliminate governmental controls on the wellhead price of such gas. State regulation that interferes with this purpose is pre-empted. 474 U.S. 409 at 432-433 (Rehnquist, J. dissenting).

Here there is no question as to the conflict between DACO regulation and federal deregulation policy. The Puerto Rico regulation does precisely what Congress has precluded the federal government from doing. Here, as in Transco, the question is

> whether Congress, in revising a comprehensive federal regulatory scheme to give market forces a more significant role in determining the supply, the demand and the price of [petroleum], intended to give the States the

> power it had denied [the President]. The answer . . . must be in the negative. 474 U.S. at 422.

The Puerto Rico regulation, if enforced, directly conflicts with congressional determinations that the free market should govern petroleum pricing.

Moreover, here, as in Transco, the pricing of petroleum "is still a matter of deep federal concern." Id. In virtually every legislative and executive expression of national energy policy since 1979, deregulated, market based petroleum pricing is a central feature. It is not a subsidiary or ambiguous aspect of energy policy; it is the cornerstone. The only obvious distinction between the instant case and Transco is that EPCA resulted in the deregulation of all petroleum pricing,

while NGPA resulted in the deregulation of only a portion of natural gas pricing. This is a distinction without a difference. In both enactments,

> the change in regulatory perspective . . . rested in significant part on the belief that direct federal price control exacerbated supply and demand problems by preventing the market from making long-term adjustment. [The state's] actions threaten to distort the market once again by artifically increasing supply and price. 474 U.S. at 424 (footnotes omitted).

Given these similarities, absent overruling Transco, the Court can uphold the Puerto Rico regulation only by refusing to recognize the intent of Congress to let market forces govern petroleum prices after expiration of the generic standby authorities included in EPCA.

Petitioners claim that TECA misread Transco "as announcing a new standard of general application that calls for the continued preemption of state law even after complete termination of federal regulation unless there is affirmative congressional intent to permit such state law." Pet. Br. at 13 (emphasis in original). Petitioners misconstrue TECA's application of Transco.

Contrary to petitioners' theory, TECA did not view Transco as establishing a "new preemption standard." Pet. Br. at 45. TECA relied on Transco for the proposition that preemption can result "from the absence rather than the presence of federal authority." 811 F.2d at 1514. TECA's quote from Transco[8/] in

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8/ "[A] federal decision to forege regulation in a given area may imply an authoritative federal
(footnote continued)

support of this conclusion originated in Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n., 461 U.S. 375 (1983), which in turn was based on established authority. Id. at 384. Here, as documented above, Congress has affirmatively modified its regulatory program and substituted a national energy policy centered around a free marketplace for petroleum products. Thus, TECA's reliance on Transco was not misplaced.

The Solicitor General seeks to distinguish Transco by arguing that its application should be limited to instances involving "[a] comprehensive federal regulatory scheme within which

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(footnote continued from previous page)
determination that the area is best left unregulated and in that event would have as much pre-emptive force as a decision to regulate." [Emphasis in original.] 811 F.2d at 1514.

one area has been deliberately left unregulated." U.S. Br. 19. Such a narrow interpretation of Transco would depreciate Congress' deregulatory enactments, by giving them less effect than regulatory enactments. Moreover, where is the line to be drawn to determine how much of the regulatory scheme can be deregulated?

But even if the Solicitor General's analysis of Transco is correct, preemption of the DACO orders is still essential in light of EPCA's comprehensive energy regulatory scheme. See pp. 17-27 supra. While Congress intended that the broad grant of the President's generic authority to impose price and allocation controls was to expire, many other facets of EPCA's regulatory scheme remain extant. See,

e.g., Energy Policy and Conservation Act Amendments Act of 1985, Pub. L. No. 99-58 (extending EPCA Title I authority to June 30, 1989, and EPCA authority with respect to IEP until June 30, 1988). Thus, even using the Solicitor General's own formulation "one area" -- regulation of petroleum prices and allocations in a period of ample supply -- "has been deliberately left unregulated," and, therefore, is preempted.

CONCLUSION

The judgment of the Temporary Emergency Court of Appeals should be affirmed.

Respectfully submitted,

DAVID GINSBURG
JOHN H. ZENTAY
GARY J. KLEIN
IRA T. KASDAN
GINSBURG, FELDMAN AND BRESS, Chartered
1250 Connecticut Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 637-90940

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BRIEF

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,
Petitioners,

v.

ISLA PETROLEUM CORPORATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF *AMICUS CURIAE* OF THE AMERICAN PETROLEUM INSTITUTE

Arnold S. Block
G. William Frick*

AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8000

Counsel for the
American Petroleum Institute

*Counsel of Record

CASILLAS PRESS INC. — 1717 K STREET NW WASHINGTON DC 20036 — 223-1220

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41 Fed. Reg. 40451 (Sept. 20, 1976) 6

44 Fed. Reg. 7070 (Feb. 5, 1979) 6

44 Fed. Reg. 12634 (Mar. 8, 1979) 6

44 Fed. Reg. 70118 (Dec. 6, 1979) 6

Legislative Materials:

121 Cong. Rec. 5220-21 (1975) 5

121 Cong. Rec. 22,740 (1975) (Statement of Rep. Staggers) 4

121 Cong. Rec. 5220-21 (1975) 5

121 Cong. Rec. 23,959 (1975) 5

121 Cong. Rec. 28,199 (1975) 5

121 Cong. Rec. 23,983 (1975) 5

121 Cong. Rec. 25,881 (1975) 5

H.R. Rep. No. 340, 94th Cong., 1st Sess, *reprinted in* 1975 U.S. Code Cong. Admin. News 1762, 1818 ..... 6, 12

Other Materials: Page

11 Weekly Comp. Pres. Doc. 45-50 (1975) 4

11 Weekly Comp. Pres. Doc. 143-145 (1975) 4

11 Weekly Comp. Pres. Doc. 974-976 (1975) 5

Secretary, U.S. Department of Energy, *A Report to Congress: The Domestic Impact of Reliance on Market Forces During a Substantial Petroleum Supply Disruption* (1983) 15

U.S. Department of Energy, Energy Information Administration, *Macroeconomic Effects of Petroleum Supply Interruptions* (February 1981) 4

American Petroleum Institute, *Energy Security For the United States: Progress, Pitfalls, Potential* (1982) 5, 7

S. Harvey and C.T. Rousch, Jr., *Petroleum Product Price Regulations: Output Efficiency and Competitive Effects*, Staff Report of the Bureau of Economics to the Federal Trade Commission (February 1981) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1406

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,
Petitioners,

v.

ISLA PETROLEUM CORPORATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF *AMICUS CURIAE* OF THE AMERICAN PETROLEUM INSTITUTE

STATEMENT OF INTEREST

This brief if filed pursuant to Supreme Court Rule 36.2[1] by the *amicus curiae* American Petroleum Institute ("API"), a trade association comprised of over 200 corporations engaged in the exploration, production, refining and marketing of crude oil and petroleum products. API and its membership have consistently advocated before Congress and the various Administrations that reliance on the free market system is

[1]The parties have consented in writing to the filing of this brief. Copies of the letters from counsel have been lodged with the Clerk.

crucial to an efficient domestic energy industry and thus to our National security.

The negative effects of government controls on energy markets were amply demonstrated during the course of some nine years of oil price and allocation controls which began in 1971. Rather than protecting Americans from higher oil prices, there is considerable evidence that the controls boomeranged, artificially maintaining high public consumption levels, depressing domestic crude oil production, triggering localized fuel shortages and ultimately resulting in higher oil prices.

In 1975, the President and Congress agreed that a new direction in national energy policy was urgently needed. The cornerstone of that new policy, embodied in the Energy Policy and Conservation Act of 1975 ("EPCA"), was the phased decontrol of oil prices, resulting ultimately in total reliance on free market forces.

The question before the Court is whether Congress' clear intent in the EPCA to have United States oil prices governed by the free market preempts an order of the Commonwealth of Puerto Rico establishing maximum prices and profit margins on gasoline sales.

API argues below, as it did before the U.S. Temporary Court of Appeals ("TECA"), that the Supremacy Clause, U.S. Const. art. VI, cl.2, and the precedents of this Court dictate that the answer to this question be in the negative.

STATEMENT OF THE CASE

In 1973, Congress responded to spiralling inflation and the Middle Eastern oil embargo by amending the Economic Stabilization Act ("ESA") to authorize the President to "establish priorities of use and . . . systematic allocation of supplies of petroleum products including crude oil in order to meet the essential needs of various sections of the Nation . . ."[2] Pursuant to this authority, the Cost of Living Council devised a complex set of price and allocation regulations governing all petroleum substances produced, refined or marketed in the United States.[3]

Shortly thereafter, Congress passed the Emergency Petroleum Allocation Act of 1973 ("EPAA")[4] to continue the petroleum price and allocation controls past the scheduled April 30, 1974, expiration of the ESA and for the first time to *require* the imposition and maintenance of such controls. Like the ESA controls it incorporated, the EPAA was to be of relatively short effect, as it was scheduled to expire in February 1975.

The embargo not only created crude oil shortages but permitted world oil prices to soar. In the United Staes, long gasoline lines became common, independent truckers staged violent strikes protesting their limited fuel allocations, and urban areas suffered fuel shortages while many rural areas had excess supplies. It quickly became apparent that a new era

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[2]Pub. L. No. 93-28, § 2, 87 Stat. 27 (April 30, 1973) codified at 12 U.S.C. § 1904 note.)

[3]*See* C.F.R. 150 Subpart L, 38 Fed. Reg. 22, 536 (Aug. 22, 1973). Earlier in August 1981, minor controls had been imposed on the petroleum industry as part of the broad ESA program against inflation.

[4]Pub. L. No. 93-159, 87 Stat. 628 (codified, as amended at 15 U.S.C. §751). The EPAA expressly preempted conflicting state and local regulations. 87 Stat. at 633 (codified at 15 U.S.C. §755(b)).

had dawned in the United States, an era when vulnerability to energy disruptions abroad required that a new national energy strategy be devised.

Some nine months after the embargo was lifted, President Ford in his first State of the Union Message proposed the immediate decontrol of the price of domestic crude oil as the centerpiece of his plan to achieve national energy independence. The President was convinced, as the Nation's petroleum industry had long contended, that controls exacerbated, not ameliorated, the effects of petroleum shortfalls.[5] By restraining prices at the outset of a disruption, controls helped maintain high levels of public fuel consumption, while discouraging domestic crude oil exploration and production and increasing reliance on imported crude oil.[6] Moreover, although controlled, prices eventually rise to levels equal or greater than if market forces had remained unencumbered.[7]

The President's proposal to decontrol oil prices triggered a vocal debate in Congress. This debate resulted from the perception by some in Congress that the benefits of reliance on the free market — more efficient petroleum allocation and increased domestic production of oil — might be outweighed by a feared renewal of inflationary pressures due to any resulting rise in oil prices.[8]

[5] *See* 11 Weekly Comp. Pres. Doc. 45-50 (Jan. 15, 1975).

[6] *See* 11 Weekly Comp. Pres. Doc. 143-145 (Feb. 4, 1975). These views were later confirmed in a 1979 Department of Energy study which concluded that the Gross National Product loss during a supply disruption is 30 percent higher when the shortage is managed by controls rather than by free market pricing. U.S. Department of Energy, Energy Information Administration, *Macroeconomic Effects of Petroleum Supply Interruptions*. (March, 1979).

[7] S. Harvey and C.T. Rousch, Jr., *Petroleum Product Price Regulations: Output Efficiency and Competitive Effects*, Staff Report of the Bureau of Economics to the Federal Trade Commission. (February 1981).

[8] *See, e.g.*, 121 Cong. Rec. at 22, 740 (statement of Rep. Staggers). This fear proved unfounded, for by mid-1982 the Organization of Petroleum Exporting Countries' "OPEC" posted crude oil prices were 3.6 percent below the early 1981 level. American Petroleum Institute, *Energy Security For The United States: Progress, Pitfalls, Potential* (1982) at 13. (*hereinafter "Energy Security"*).

There ensued a standoff between the President and Congress. President Ford vetoed three bills which would have continued controls[9] and Congress twice vacated, through legislative vetoes, Administration decontrol programs.[10] As frustration mounted on all sides, it became evident that a compromise was required. The Administration put forward successive proposals for staged, rather than immediate, decontrol over periods of 24 months, 30 months and 39 months; each was rejected by Congress.

While Congress was unable to muster the votes necessary to override the President's veto of extensions of EPAA authorities, President Ford disfavored simple expiration of his regulatory authority. He continued to call for comprehensive legislation establishing a national policy designed to stimulate domestic production and thus assure future energy independence, the "essential first step" of which was settlement of the petroleum price controls issue.[11]

Finally, in December 1975, an acceptable accord was struck, culminating in the passage and signing into law of the EPCA. Section 416 of that Act extended the President's mandatory controls authority through April 1979 (with the avenue of selective decontrol subject to a one-house veto) and thereafter pro-

[9] 121 Cong. Rec. 5220-21 (March 5, 1975); 121 Cong. Rec. 23,959 (July 2, 1978) and 121 Cong. Rec. 28,199 (Sept. 9, 1975).

[10] 121 Cong. Rec. 23,983 (July 22, 1975) and 121 Cong. Rec. 25,881 (July 30, 1975).

[11] 11 Weekly Comp. Pres. Doc. 974-976 (Sept. 9, 1975). Establishment of the Strategic Petroleum Reserve to stockpile crude oil supplies was another important element in this policy.

vided for discretionary controls, the authority for which absolutely terminated on September 30, 1981.[12]

Congress thus acceded to President Ford's view that reliance on the free market mechanism was an essential component of the Nation's energy policy. The President, in turn, accepted that extension of the EPAA offered the "potential for a smooth transition of petroleum markets from a closely regulated state to a largely unregulated status subject to standby pricing and allocation authority."[13]

Pursuant to this legislated policy of gradual establishment of an unregulated petroleum market, President Ford, followed by President Carter, quickly moved forward to exempt individual petroleum products from regulation.[14] Final decontrol was accomplished by President Reagan on January 28, 1981,[15] reaching Congress' goal of an unfettered marketplace eight months prior to the expiration of his regulatory authority under the amended EPAA. Almost immediately world oil

[12]Pub. L. no. 94-163, Title IV, §461, 89 Stat. 871 (1975) (codified at 15 U.S.C. §760(g)).

[13]H.R. Rep. No. 340, 94th Cong., 1st Sess., reprinted in 1975 U.S. Code Cong. Admin. News 1762, 1818 (hereinafter H.R. Rep. No. 346).

[14]Residual fuel oil was decontrolled by the Department of Energy's ("DOE") predecessor, the Federal Energy Administration ("FEA"), effective June 1, 1976. 41 Fed. Reg. 13896 (April 1, 1976). Middle distillates (No. 2 heating oil, No. 2 diesel fuel, No. 1 heating oil, No. 1 diesel fuel, and kerosene) were decontrolled by FEA effective July 1, 1976. 41 Fed. Reg. 24516 and 24518 (June 16, 1976). Naphthas, gas oils and "other products" were exempted effective September 1, 1976, 41 Fed. Reg. 30096 (July 22, 1976). Naphtha jet fuel was exempted effective October 1, 1976. 41 Fed. Reg. 40451 (September 20, 1976). Kerosene-base jet fuel and aviation gasoline were decontrolled by DOE effective February 26, 1979. 44 Fed. Reg. 7070 (Feb. 5, 1979); 44 Fed. Reg. 12634 (March 8, 1979). Butane and natural gasoline were decontrolled effective January 1, 1980. 44 Fed. Reg. 70118 (December 6, 1979).

[15]*See* Executive Order 12287, 46 Fed. Reg. 9,909 (Jan. 28, 1981).

prices began to fall. By mid-1982, OPEC prices were 3.6 percent below the early 1981 level.[16]

This scheme of total reliance on the free market was abruptly upset in 1986 when the Puerto Rico Department of Consumer Affairs ("DACO") issued a series of Orders establishing maximum prices and gross profit margins of gasoline refiners and wholesalers within the Commonwealth.[17] These orders were ostensibly triggered by the perception of Puerto Rico government officials that wholesale gasoline prices in Puerto Rico failed to fully reflect the substantial drop in crude oil prices which occurred in the first quarter of 1986.

Upon suit by all refiners and wholesalers operating in the Commonwealth, the U.S. District Court (Puerto Rico) enjoined DACO from implementing or enforcing its price freeze and margin regulations on several Constitutional bases.[18] Most pertinently, the court ruled that DACO's orders were "preempted by the Federal delegated purpose to let the market forces be sovereign in this field."[19] This Congressional purpose was evidenced in the EPCA, which had amended the EPAA to provide for a phased, but absolute deregulation of petroleum prices and allocations.

Concurrent appeals to TECA and the United States Court of Appeals for the First Circuit were submitted by Petitioners. TECA exercised exclusive jurisdiction over the preemption

[16]*Energy Security, supra.*

[17]*See* Pet. App. at 42a-45a and Joint Appendix ("J.A.") at 7-12, 21-29.

[18]Isla Petroleum Corp. v. Department of Consumer Affairs, 640 F. Supp. 474 (D.P.R. 1986) *reprinted in* Petitioners' Supplemental Appendix ("SA").

[19]SA-86. The court also held that by forcing wholesalers to operate at a loss, the orders constituted an impermissible taking without just compensation and a violation of due process contrary to the Fifth and Fourteenth Amendments to the Constitution. SA-57-76.

issue based on its sole authority over claims arising under the EPAA, as amended. Thereafter, the First Circuit stayed its consideration of the remaining issues on appeal, pending final disposition of this case.

On December 30, 1986, TECA affirmed the district court's preemption finding. The court held that in enacting the EPCA amendments to the EPAA, "Congress intended to rely almost exclusively on market forces to determine prices and allocate supplies of petroleum products and to avoid governmental interference with market mechanisms." Pet. App. 16a. Thus, just as in *Transcontinental Gas Pipeline Corp. v. State Oil and Gas Board,* (*hereinafter* "Transco") 474 U.S. 409 (1986), "the federal decision to forego regulation implies 'an authoritative federal determination that the area is best left *un*regulated,' and Congress did not intend to give the states the power it denied the federal government." *Id.* at 17a (emphasis in original).

SUMMARY OF ARGUMENT

The Statement of the Case, *supra,* demonstrates in painstaking detail that the crucial component of the congressional program for U.S. energy independence under the EPCA was reliance on free market forces in petroleum pricing and allocation. Attainment of that objective — improved energy security — is clearly frustrated by the assertion by states or localities, such as Puerto Rico, of the power to set maximum prices or margins on petroleum or petroleum products. By upsetting the mechanism necessary to achieve that objective — free market pricing — Puerto Rico's regulations and those of any states or localities which may follow its lead "stand as an obstacle to the accomplishment" of Congress' energy policy objectives.

This Court's decision in *Transco* clarified that where federal deregulation is directed at the objective of giving free sway to market forces, state regulations that obstuct that goal are preempted. The Temporary Emergency Court of Appeals correctly applied that standard in determining that Puerto Rico's gasoline price and margin controls were preempted by the EPAA.

ARGUMENT

PUERTO RICO'S GASOLINE PRICE AND MARGIN ORDERS ARE PREEMPTED PURSUANT TO CONGRESS' OBJECTIVE OF IMPROVED NATIONAL ENERGY SECURITY BY SOLE RELIANCE ON MARKET FORCES.

It is well-established that, under the Supremacy Clause, federal law may preempt state law in any of three ways: first Congress may explicitly define in a statute the extent to which it intends to preempt state law; second, even in the absence of statutory preemptive language, Congress may indicate an intent to occupy an entire field of regulation; third, Congress may preempt state law, even if it has not displaced state law entirely, to the extent that the state law actually conflicts with federal law.[20] In the last instance, such a conflict arises, and the state law is consequently preempted, 'when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' "[21] It is presentment of such an "obstacle" that requires that state regulation of petroleum prices, such as at bar, must fall.

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[20] *See, e.g., Michigan Canners & Freezers Assocaiton v. Agricultural Marketing & Bargaining Board,* 467 U.S. 461, 469 (1984).

[21] *Id. (quoting from Hines v. Davidowitz,* 312 U.S. 52, 67 (1941)).

A. A Decision By Congress To Deregulate An Area Of Commerce Has The Identical Preemptive Effect As A Decision To Regulate An Area.

At the time of this Court's 1986 ruling in *Transco*, the precept that "a federal decision to forego regulation in a given area may imply on authoritative federal determination that the area is best left *un*regulated, and in that event would have as much preemptive force as a decision to regulate" was accepted.[22] That "time-honored principle," to adopt the Petitioners' description,[23] was applied in *Transco* for the first time in a new vein, that being to assess the preemptive effect of a legislative withdrawal of earlier delegated authority.[24]

This Court there rejected the notion relied on by the Mississippi Supreme Court that deregulation can be preemptive only if Congress specifically adverted to the question of state regulation. Rather, the Court found "in light of Congress' intent to move toward a less-regulated national natural gas market, its decision to remove. . . [federal regulatory authority] cannot be interpreted as an invitation to the States to impose additional regulations." 474 U.S. at 423.

[22] Arkansas Electric Cooperative v. Arkansas Public Service Commission, 461 U.S. 375, 384 (1983) (emphasis in original). *See also* Ray v. Atlantic Richfield Company, 435 U.S. 151, 178 (1978).

[23] *See* Pet. Br. at 45.

[24] 474 U.S. at 422. *Transco* involved the review of a Mississippi regulation requiring natural gas pipelines to purchase natural gas ratably (proportionally) from all those with an equity interest in a common gas pool. Years earlier, a similar requirement in Kansas was struck down by the Court on preemption grounds under the Natural Gas Act of 1938 ("NGA"). The NGA had since been superseded by the Natural Gas Policy Act ("NGPA") which, most relevantly, removed from federal jurisdiction the authority to regulate first sales of certain "high-cost" gas recovered from deep wells. Thus, the issue presented was whether Congress' decision to remove jurisdiction from the Federal Energy Regulatory Commission ("FERC") served as an "invitation" to the States to assume such regulatory power.

Transco was thus correctly applied by TECA, below, as affirming that a federal deregulatory scheme to rely on market forces could implicitly preempt state and local regulation which interfered with those market forces. As conclusively shown *supra*, the gradual withdrawal of controls under the EPCA did not augur a slackening of federal concern in the area but rather constituted a definitive policy to permit petroleum market forces free sway. Under such circumstances, it is not credible to argue that, while Congress' intent to move toward "less" regulation of a market is preemptive, an intent to provide a totally unregulated market is less so. *A fortiori*, total deregulation under these circumstances is deserving of even greater preemptive effect.

B. Irrespective Of Whether The EPAA Has Expired, Congress' Implicit Intent To Have Petroleum Prices Free From Regulation Must be Honored.

At the core of the argument of Petitioners and *amici* that preemption of state petroleum pricing no longer applies is their assertion that the EPAA expired in September 1981, thus invalidating the express preemption provision contained therein. While we agree that that preemption provision no longer pertains, this Court's decision in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), makes that fact irrelevant. In *Rath Packing*, this Court held that the inapplicability of an express preemption provision is not determinative under the Supremacy Clause, for it must still be decided whether the state law stands as an obstacle to accomplishment of the full purposes and objectives of Congess. *Id.* at 540.

Petitioners and *amici* unjustifiably assume that the EPAA has expired.[25] The text of 15 U.S.C. § 760g — the provision

[25] It is certainly correct that both TECA and this Court have said that the EPAA did expire in 1981. Mobil Oil Corp. v. Tully, 653 F.2d 497,

governing expiration of authority — does not state that the Act would expire on September 30, 1981. Instead, the relevant portion provides:

> The [President's] authority to promulgate and amend any regulation or to issue any order under this chapter [i.e., the EPAA] shall expire at midnight September 30, 1981 . . . .

15 U.S.C. § 760g. Nowhere does this provision state that the EPAA itself expires — at *any* time. It does say, however, that the Congress did not want further promulgation, amendment, and enforcement of regulations after September 30. Technically then, the EPAA is still on the books in a type of "stand by" status, ready to be reactivated should Congress ever find it desirable, through the simple expedient of altering § 760g to again authorize the President to regulate.

This language contrasts sharply with that of the expiration provision of the Emergency Price Control Act of 1942, 56 Stat. 23, in effect during World War II, cited by Petitioners before TECA as being comparable to that in the EPAA. That Act, as amended, provided "the *provisions of this Act* . . . shall terminate" (emphasis added).

It is understandable that Congress would permit the EPAA itself to remain unexpired, while ending all power to regulate under it. Consistent with Congress' express wish to provide for "a smooth transition of petroleum markets from a closely regulated state to a largely unregulated status," H.R. Rep. No. 340 at 1818, this wording keeps the federal interest sufficiently clear to preempt state regulations. This Court should not lightly overlook Congress' choice of language in § 760g

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502 (TECA 1981); Tully v. Mobil Oil Corp., 455 U.S. 245 (1982). However, neither Court's statement on this point was a holding nor were they based on briefing of the issue.

by holding it to have the same effect as the explicit statutory expiration provision in the Emergency Price Control Act of 1942.

Even were one to assume that the EPAA expired on September 30, 1981, that supposition has no impact on the vitality of Congress' scheme to rely on free market pricing as a means toward achieving national energy independence. First, as acknowledged by the Solicitor General, even in repealing a law having preemptive effect Congress has the power to continue that preemption after federal controls have been lifted. U.S. Br. at 20, n.8. The Solicitor General reads into *Transco* a requirement that such intent be expressly stated, a reading that, as discussed above, has no basis in this Court's Opinion.

Second, notwithstanding the EPAA, the EPCA continues to "frame a national energy policy." U.S. Br. at 20, n.9. The very cornerstone of that policy, to restate the obvious, is reliance on the free market system to create an environment where energy security becomes attainable. State regulation of petroleum prices presents a clear obstacle to that Congressional objective, and the path which TECA has cleared must be kept open by this Court.

C. Post-EPAA Events Confirm Congress' Intent To Have Free Market Forces Establish Petroleum Prices.

Occurrences after the EPCA's enactment in 1975, identified by the Petitioners, do not alter Congress' clear contemporaneous intent to have petroleum market forces operate freely after the 1981 expiration of federal regulatory authority. We can add little to TECA's comprehensive analysis of these actions leading to its judgment that such "post-expiration actions reinforce our conclusion that by phasing out federal

authority to regulate the petroleum markets Congress intended to establish markets free of any government interference."[26]

We note, however, that Petitioners mischaracterize an American Petroleum Institute report introduced into the record during hearings in July 1981 before the Senate Committee on Energy and Natural Resources. Pet. Br. at 30. That report, *State Response to Decontrol: Emergency Energy Withdrawal Legislation and Related 1981 Legislative Action in the States* (April 13, 1981), did not as stated, address, nor even mention, the subject of preemption of state laws.

D. The Active Participation Of States And Localities In This Case Reinforces The Need For Preemption.

Petitioners continue to assert that special local circumstances justify regulation of petroleum prices by Puerto Rico. Pet. Br. 46, 47. While the competitiveness of the refining and wholesale gasoline markets is not properly at issue here, it is noteworthy that the District Court fully considered that issue and ruled that both markets were "highly competitive." S.A. 37.

More important is Petitioners' offhanded response to TECA's valid concern that a proliferation of state regulations on petroleum prices would operate to frustrate Congress' free market objectives. Pet. Br. at 47. If Puerto Rico is free to regulate gasoline prices, there is nothing to prevent other states from regulating both crude oil and petroleum products for their own parochial interests.

If States are not preempted by the national policy of decontrol it is likely that a conflicting patchwork of state regulations could develop. This could create supply disruptions as

[26]See Pet. App. at 14a-17a.

economic pressures would dictate that the petroleum industry respond to such price controls by directing petroleum supplies to locales permitting adequate rates of return. Spot shortages of products could thereby result, encouraging States to attempt to recoup through product allocation requirements. In short, the vicious cycle which proved so counter-productive during federal controls could be revisited, perhaps even exacerbated this time by the absence of any central authority.[27]

Crude oil pricing controls by states would be even more devastating than product controls. Imported oil, due to the drop in world prices, has risen to comprise approximately 40 percent of current United States oil consumption. The Nation can ill afford to have its domestic production of oil discouraged further by state price controls.

In summary, the active participation by States and State and Local Government Organizations in this case as *amici curiae* belies Petitioners' attempt to characterize this case as having no significance outside of Puerto Rico.

[27]In 1983 the Secretary of the U.S. Department of Energy reported to Congress "Unregulated market pricing and allocation is the most efficient way of allocating petroleum products, during both periods of supply disruptions and ***during normal periods***." "In the past, price controls and allocation regulations and the ***prospect*** that controls and allocations ***might*** be implemented served to hinder the smooth functioning of the U.S. oil market and exacerbated the effects of supply disruptions." (emphasis added). ***A Report to Congress: The Domestic Impact of Reliance On Market Forces During a Substantial Petroleum Supply Disruption***, at I-5, submitted pursuant to the Energy Emergency Preparedness Act of 1982, Pub. L. 97-229, 96 Stat. 248 (1982).

The Commerce Clause may provide an inadequate safeguard in this regard, contrary to Petitioners' suggestion. Pet. Br. at 47. While the regulations of any one State may not unduly burden interstate commerce, proliferation of such regulations could cumulatively present such an impact.

CONCLUSION

The judgment of the Temporary Emergency Court of Appeals should be affirmed.

Respectfully submitted,

Arnold S. Block
G. William Frick*

AMERICAN PETROLEUM INSTITUTE
1220 L Street, N.W.
Washington, D.C. 20005
(202) 682-8000

Counsel for the
American Petroleum Institute

*Counsel of Record

January 11, 1988

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
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No. 86-1406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,

Petitioners,

v.

ISLA PETROLEUM CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari to the Temporary Emergency Court of Appeals

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[redacted]

BRIEF OF THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

PETER L. DE LA CRUZ*
CATHERINE N. ROEMER
Keller and Heckman
1150 17th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 956-5600

BARBARA FAULKNER
PETROLEUM MARKETERS ASSOCIATION OF AMERICA
1120 Vermont Avenue, N.W.
Suite 1130
Washington, D.C. 20005
(202) 331-1198

Counsel of Record

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1406

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,

Petitioners,

v.

ISLA PETROLEUM CORPORATION, *et al.*,

Respondents.

MOTION OF PETROLEUM MARKETERS ASSOCIATION OF AMERICA FOR LEAVE OF COURT TO FILE *AMICUS CURIAE* BRIEF*

The Petroleum Marketers Association of America (PMAA) respectfully moves this Court, pursuant to this Court's Rule 36, for leave to file the attached brief as an *amicus curiae* in support of respondents.

PMAA is a national organization of marketers, wholesalers, distributors, and retailers of petroleum products, having a significant interest in this Court's decision. This action involves the validity of Puerto Rico's regulation of prices and gross margins on

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* Consent of the attorneys for the respondents has been obtained. The consent of the attorney for the petitioners was requested, but not obtained.

gasoline sales in the face of Congressional intent to deregulate completely the petroleum marketplace.

The Temporary Emergency Court of Appeals (TECA) below upheld the United States District Court for the District of Puerto Rico's order enjoining the Puerto Rican Department of Consumer Affairs from implementing its price regulations. That ruling, and this Court's support of it, will have a significant impact on preventing the wholesale and uncoordinated regulation of all levels of the petroleum distribution chain by some fifty states. Affirmance of TECA's decision, while respecting Congressional intent to deregulate the petroleum marketplace, should have no bearing on the delicate federal-state balance in legislating antitrust laws that prohibit price discrimination, below-cost sales, or predatory pricing, which serve the marketplace by protecting smaller competitors from unfair competition.

For the foregoing reasons, PMAA respectfully requests that its motion for leave to file an *amicus*

curiae brief be granted and that the attached *amicus curiae* brief be accepted for filing.

Dated: January 11, 1988
Washington, D.C.

Respectfully submitted,

/s/ PETER L. DE LA CRUZ
KELLER AND HECKMAN
1150 17th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 956-5600

Counsel for the
Petroleum Marketers
Association of America

QUESTION PRESENTED

Whether Congress intended to preempt state regulation such as Puerto Rico's Price Regulation No. 45 and rely on market forces as the sole determinant of prices and allocation of petroleum products when it enacted the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. §§ 751 *et seq.*, as amended by the Energy Policy Conservation Act (Pub. L. No. 94-163, 89 Stat. 941)?

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Mobil Oil Corp. v. Dubno, 492 F. Supp. 1004 (D. Conn. 1980), *aff'd in part, dismissed in part*, 639 F.2d 919 (2d Cir.), *cert. denied*, 452 U.S. 967 (1981) 17,18

Mobil Oil Corp. v. Tully, 499 F. Supp. 888 (N.D. N.Y. 1980), *aff'd*, 653 F.2d 497 (Temp. Emer. Ct. App. 1981), *vacated and remanded*, 455 U.S. 245 (1982) 17

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National Energy Policy Plan, 49 Fed. Reg. 30646 (1984) 9,10

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Natural Gas Act, ch. 556, 52 Stat. 821, 15 U.S.C. §§ 717 *et seq.* 7-8

Natural Gas Policy Act of 1978, Pub. L. No. 95-621, 92 Stat. 3351, 15 U.S.C. §§ 3301 *et seq.* 7

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S. Conf. Rep. No. 516, 94th Cong., 1st Sess., *reprinted in* 1975 U.S. Code Cong. & Admin. News 1956 11,12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1406

PUERTO RICO DEPARTMENT OF CONSUMER AFFAIRS, *et al.*,

Petitioners,

v.

ISLA PETROLEUM CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari to the Temporary Emergency Court of Appeals

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BRIEF OF THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

This *amicus curiae* brief is submitted by the Petroleum Marketers Association of America (PMAA),[1]

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[1] The Petroleum Marketers Association of America, a national organization representing petroleum marketers, is a federation of state and retail trade associations representing some 11,000 independent petroleum marketers, including gasoline and diesel fuel wholesalers, commissioned distributors of gasoline, gasoline

whose member companies include wholesalers, marketers, distributors, and retailers of petroleum products. The Petroleum Marketers Association of America supports Respondents in seeking affirmance of the Judgment of the Temporary Emergency Court of Appeals (TECA) that Puerto Rico's regulation of prices and gross margins on gasoline sales is preempted by Congressional intent to let market forces be "sovereign" in setting prices and allocating supplies of petroleum products. Pet. App. 17a.[2] Allowing Puerto Rico's order fixing gross margins for gasoline wholesalers to stand and removing free market considerations from the regulation of petroleum products will greatly burden all levels of the petroleum distribution chain. Such a ruling will invite not just Puerto Rico's regulation of petroleum products, but fifty states' individual regulations as well. Such a ruling would not only clearly frustrate Congress' intent to allow market forces to regulate the allocation and price of petroleum products, Pet. App. 13a, but also would confuse and disrupt the national petroleum market.

This brief focuses on the preemptive effect on state law of Congress' intent to deregulate the petroleum market under the Emergency Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 627 (codified as amended at 15 U.S.C. §§ 751-760h (1982)) (EPAA),

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reseller-retailers and thousands of retail fuel oil dealers, as well as independent marketers serving the industry by storing and supplying petroleum products. Collectively these petroleum marketers account for nearly 50% of the gasoline and 75% of the home heating oil sold in the United States.

[2] "Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari filed in this case.

and its legislative history; however, affirmance of TECA's order will in no way shift the regulatory balance between states and the federal government. State law is preempted only when Congress has expressed its intent to preempt. For example, TECA's decision in no way implicates federal and state antitrust laws that prohibit price discrimination, below-cost sales, or predatory pricing. The issues raised by this appeal are of far-reaching importance to the free operation of the petroleum market as intended by Congress; the Petroleum Marketers Association of America fully supports respondents' argument that TECA's decision is correct and should be affirmed.

SUMMARY OF THE ARGUMENT

1. With the passage of the Energy Policy and Conservation Act (EPCA) in 1975, Pub. L. 94-163, 89 Stat. 941, Congress decided to deregulate the petroleum market. Removal of price and allocation controls from the Federal Government reflected Congressional intent to free the petroleum market from all regulation, including state control. The Federal Government's energy policy of the 1970's and 1980's supports this conclusion. Congress' deregulation of the market was based on an affirmative Congressional decision that government intervention in the energy market is inefficient and inadequate to encourage the most productive use of our country's resources.

2. This Court held in *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board*, 106 S. Ct 709 (1986), that Congressional intent to deregulate an area should be given as much weight as a federal decision to regulate affirmatively when analyzing preemption claims. Thus, Puerto Rico's regulation of gross profits

on gasoline sales flies in the face of Congressional intent to let market forces alone control the allocation and price of petroleum products.

3. Despite petitioners' argument to the contrary, *Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982), is not controlling in this case. Petitioners ignore this Court's refusal in *Tully* to express an opinion on whether federal interests preempt state authority after the "expiration" of a federal price control regulation.

4. TECA's decision upholding the United States District Court for the District of Puerto Rico's order enjoining Puerto Rico from implementing Price Regulation 45 is manifestly correct. This conclusion, however, is narrowly drawn and in no way upsets the careful balance of antitrust regulation between the states and the Federal Government.

ARGUMENT

I. Puerto Rico's Price Regulation No. 45 and the Subsequent Orders Implementing It Directly Conflict With Congress' Intent to Rely on Market Forces Exclusively to Determine Price and Distribution of Petroleum Products.

TECA upheld the United States District Court for the District of Puerto Rico's order enjoining the Puerto Rican Department of Consumer Affairs (DACO) from implementing Price Regulation 45, Puerto Rico's authority for fixing prices and profits in the sale of gasoline, kerosene, and diesel oil. *Isla Petroleum Corporation v. Puerto Rico Department of Consumer Affairs*, 811 F.2d 1511, 1519 (Temp. Emer. Ct. App. 1986) Pet. App. 1a, 17a. Promulgated in 1975, Price Regulation 45 originated in earlier Puerto Rican laws empowering the Secretary of DACO to

fix prices of commodities in Puerto Rico. 23 L.P.R.A. § 734; 3 L.P.R.A. § 341e. TECA determined that Regulation 45, issued in anticipation of the EPAA's expiration, and the subsequent orders implementing it, were preempted by Congressional intent to deregulate the petroleum market.

A. Congress' Removal of Price and Allocation Controls from the Federal Government Reflects Its Intent that the Free Market Alone Regulate Petroleum Products.

This Court has long held that the first and fundamental inquiry in any preemption analysis is whether Congress has expressed a clear intent to preempt state law. *Wardair Canada, Inc. v. Florida Department of Revenue*, 106 S. Ct. 2369, 2370 (1986). In enacting the Energy Policy and Conservation Act of 1975, Congress determined that market conditions no longer warranted the comprehensive scheme put in place by the Emergency Petroleum Allocation Act, but that a "gradual" dismantling of the EPAA was "preferable to sudden decontrol." H.R. Rep. No. 340, 94th Cong., 1st Sess. 54, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1762, 1817. Thus Congress extended the EPAA by 40 months and provided for a 28-month period of decontrol during which the President had discretionary authority to regulate until September 30, 1981. On January 28, 1981, President Reagan exempted all remaining products regulated under the EPAA from price controls and allocation. Exec. Order No. 12,287, 3 C.F.R. 124 (1982). On September 30, 1981, discretionary price control authority expired as planned. All during this extension and discretionary period of decontrol, *including* that period between January 28, 1981, and September 30, 1981, when no federal controls were in place, state

regulation of the petroleum market was preempted. TECA determined that Congress intended by this temporary extension of the EPAA and the establishment of a phase-out period of decontrol to let the marketplace alone determine the prices and allocation of petroleum, even after the September 28, 1981 date removing Presidential authority to regulate. *Isla*, 811 F.2d at 1517.

DACO promulgated Regulation 45 in anticipation of the lifting of federal controls upon EPAA's expected expiration in 1975; when the EPCA extended the EPAA beyond its original termination date, DACO amended Regulation 45 to become effective upon federal controls ending. Regulation 45 purports to control "the prices and maximum benefits in the sale of gasoline, kerosene and diesel oil at all levels of distribution including refineries." Pet. App. 36A. Article 3 calls for 15 days notice prior to any person increasing the price of a petroleum product; the March 26, 1986 order in dispute here, reaffirms Article 3. The April 23, 1986 order placed a temporary price freeze on all wholesalers; the May 20, 1986 order established an 8.6 cents per gallon gross profit limitation on all wholesalers, rescinding the April 23 price freeze.[3] Puerto Rico's Price Regulation No. 45 and Puerto Rico's Department of Consumer Affairs' subsequent orders putting Regulation 45 into effect

[3] The May 20 order initially established a two-tiered program where companies whose profit margins were supposedly higher than the 8.6 cents per gallon figure were held to a 3.6 cents per gallon profit margin; after such a company's average margin for the period following January 1, 1986, fell to 8.6 cents, the lower 3.6 cents per gallon figure was to be lifted.

directly conflict with Congress' intent to deregulate the petroleum market and rely exclusively on market forces to determine price and distribution of petroleum products.

B. This Court Ruled in *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board* that, in Federal Preemption Analysis, Congressional Intent to Deregulate Should Be Weighed as Heavily as Congressional Intent to Regulate.

Recently, this Court ruled on the issue before it here. In *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Board*, 106 S. Ct. 709 (1986), Congressional intent to deregulate was given equal weight in determining preemption as a federal decision to regulate actively.

The *Transcontinental* case involved the validity of a Mississippi regulation that required gasoline purchasers to buy high cost "deep" gas from all holders of a gas pool, in proportion to each holder's interest. Since the Natural Gas Policy Act of 1978 (NGPA) denied the Federal Energy Regulation Committee (FERC) jurisdiction over the price of first-sale deep gas, Pub. L. No. 95-621, 92 Stat. 3351, 15 U.S.C. §§ 3301–3342, the Mississippi Supreme Court found no "implicit" preemption of the Mississippi rule. But, this Court responded that, merely because FERC can no longer directly regulate the prices at which pipelines purchase high-cost gas "has little to do with whether state regulations that affect a pipeline's costs and purchasing patterns impermissibly intrude upon federal concerns." *Id.* at 716.

The Supreme Court engaged in an analysis of the economic underpinnings of the NGPA and determined that, in response to the 1938 Natural Gas Act's (NGA)

artificial and occasionally ineffective pricing scheme, the supply and price of first-sale deep gas would be better governed by the market, Natural Gas Act of 1938, 15 U.S.C. §§ 717-717(z). This Court then concluded that Mississippi's ratable-take regulation "directly" undermined Congressional intent that the supply and demand and purchase of deep gas be determined by the marketplace. The Court thereafter held that "[A] federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much preemptive force as a decision *to* regulate." *Id.* at 716 (quoting *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375 (1983)) (emphasis in original).

C. Since 1981 the Federal Government Has Based Its Energy Policy on a Market-Based System Where Government Intervention Is Minimal and Where Market Forces Promote the Highest Efficiencies.

Congressional intent is evidenced by any variety of conditions: where a federal statute expressly preempts state law, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); where compliance with federal and state law is physically impossible, *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); where federal comprehensive legislation occupies a whole field of regulation, *Rice v. Santa Fe Elevator Corporation*, 331 U.S. 218 (1947); and where federal law implicitly bars state regulation, *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983). *See Isla* at 1514. Federal preemption of state law also occurs where state law acts as an obstacle to the accomplishment of Congress' objectives. *Hines v. Davidowitz*, 312 U.S. 52

(1941); *International Paper Co. v. Ouellette*, 107 S. Ct. 805 (1987). Petitioners, however, ignore the underlying rationales for Congress' determination to deregulate the petroleum market and erroneously attempt to assess Congressional intent by looking at the form, rather than substance, of Congress' action.

TECA's preemption argument is based on Congress' determination that government interference in energy markets does not work and that deregulation of petroleum markets will ultimately result in maximum economic efficiency. The most telling proof of Congress' intent to deregulate the petroleum market lies in the history of the United States' energy policy of the 1970's.

In response to the Organization of Petroleum Exporting Countries' (OPEC) 1973 embargo on oil and in an attempt to protect consumers and the economy from drastic price increases, Congress enacted the Emergency Petroleum Allocation Act of 1973, setting mandatory petroleum allocations and prices for most petroleum products. 49 Fed. Reg. 30646, 30649 (1984). In retrospect, the Department of Energy (DOE) characterized these controls as a failure, proving "detrimental to the U.S. economy." *Id.* In its 1983 Report to Congress on the National Energy Policy Plan, DOE blamed the price and allocation controls established by the EPAA for gasoline shortages at the consumer level and reduced domestic production at the refining level. The controls ultimately "reduced incentives to develop U.S. energy resources by holding domestic crude oil prices below world prices." *Id.* By 1977, net oil imports constituted 46% of U.S. oil consumption, almost double that of the 1972 levels. In 1982, a year after President Reagan deregulated the petroleum

market, U.S. oil imports dropped to only 28% of total American consumption. *Id.*

By the late 1970's, Congress realized that government attempts to control one aspect of the petroleum market "inevitably" created problems in other areas of the market. Price and allocation controls led not to decreased dependence on foreign markets and more stable prices, but reduced incentives to develop domestic oil, decreased exploration and production, and increased the inefficient use of government funds (used to subsidize—unsuccessfully—the development of new energy alternatives). *Id.* at 30650-30651. In 1981, Congress realized that the detrimental effects of controls far outweigh any short-term benefits of regulation. *See generally*, The National Energy Policy Plan, 49 Fed. Reg. 30646. Since that time, Congress and the Administration have "significantly revised" national energy policies: "An interventionist approach has been abandoned and replaced with increased reliance on the free market to do what no government agency can do—namely, to promote economic efficiency through innovation . . . and development of new technologies." *Id.* at 30650. As a result of completely removing price and allocation controls in 1981, domestic drilling has increased and retail gasoline prices have fallen drastically. In its 1985 report to Congress on the National Energy Policy Plan, the Department of Energy reported on the success of President Reagan's 1981 decision to deregulate the petroleum market: "Market-oriented policies that build upon America's vast production and conservation resources and its technological genius, free of arbitrary regulation, provide the best hope of maintaining the momentum of energy progress of the past 5 years."

National Energy Policy Plan of 1985, Pub. L. No. 95–91.

Congress and the Administration determined that the federal allocation and pricing regulations of petroleum products were a failure. Puerto Rico has determined, however, that its Regulation 45 can succeed where the federal government could not. If Puerto Rico's regulation and implementing orders are allowed to stand, 50 individual states will be free to thwart beneficial market forces, ignore Congressional intent, and disregard a decade of experience.

D. The Legislative History of the Energy Policy and Conservation Act Supports TECA's Determination that Congress Intended to Completely Deregulate the Petroleum Market.

The legislative history of the EPCA clearly reveals that Congress intended market forces to be the sole determinants of allocation and prices of petroleum. As stated earlier, the amendments to the EPAA extended Presidential authority to regulate the market by 40 months and provided for a 28-month period of Presidential discretionary authority following the extension period. As TECA found, "The federal regulatory scheme left little or no room for state and local regulation in the area." *Isla*, 811 F.2d at 1517. TECA's analysis of the Senate Conference Report on the EPCA accurately reads Congress' intent to preempt state regulation of petroleum markets; the Committee very clearly expressed its purpose in explaining the discretionary period of Presidential control: "To the extent that mandatory controls are no longer needed or desirable, a gradual return to an unregulated market is preferable to sudden decontrol." S. Conf. Rep. No. 516, 94th Cong., 1st Sess.

203, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1956, 2045.

The Conference Report later reaffirms that Congress fully intended its actions to bar *both* federal and state regulation of petroleum products. As the Conference Report states:

> Extension of the EPAA and its conversion to a standby authority offers, in addition, a potential for a smooth transition of petroleum markets from a closely regulated state to a large[ly] unregulated status subject to standby pricing and allocation authority.

S. Conf. Rep. No. 516, 94th Cong., 1st Sess. 204, *reprinted in* 1974 U.S. Code Cong. & Admin. News 1956, 2045.

Petitioners take umbrage at TECA's holding, insisting that "Congress was concerned 'in this discussion' only with the mechanism and effects of removing federal controls." Brief for Petitioner at 26. Petitioners' explanation, however, does not explain why Congress chose to preempt *state* authority in the deregulation period extending from May 1979 to September 1981, if not to fulfill its goal of a completely unregulated market. If Congress were concerned only about the "effects" or "mechanisms" of *de*regulation, it might easily have allowed state regulation immediately following Congress' passing EPCA, having determined that federal regulation was to end September 30, 1981. After all, according to Petitioners' argument, state regulation during this "federal phase-out" would not have in any way defeated Congress' so-called attempts to avoid the "effects" of federal deregulation. Yet Congress

specifically preempted state regulation during this phase-out period. The only logical explanation of this preemption is that Congress intended total deregulation of oil price controls, both during the phase-out period and following September 30, 1981. TECA determined that "it is inconceivable that Congress would implement such an extensive and carefully orchestrated termination of federal intervention with the intention that the states step in to regulate the same subject matter as soon as all federal intervention ceased." *Isla*, 811 F.2d at 1517.

Petitioners also assert that Congress' intent to assure "a large[ly] unregulated status subject to standby pricing and allocative authority" refers only to the 28-month period from May, 1979, to September, 1981, of Presidential discretionary authority to regulate under EPCA. But Petitioners' argument proves too much. During this period the President had the choice of regulating or not; his authority was completely discretionary and, if he so wished, he might have left all EPAA controls in place until its expiration on September 21, 1981. If Petitioners' argument is to be believed, then Congress' "large[ly] unregulated" petroleum market might never have occurred, since states, according to Petitioners, were free to regulate petroleum products without limitation on that date. Surely Congress was not modifying its phrase "large[ly] unregulated" by "if the President so chooses." Congress obviously intended that its deregulation of prices and allocation of petroleum products apply across the jurisdictional spectrum, that the preemptive effect of Congress' mandate to deregulate apply to the states as well as the federal government.

E. TECA Engaged in Traditional Preemption Analysis in Determining that Congress Intended that Market Forces Allocate and Determine Prices of Petroleum.

Contrary to Petitioners' argument, TECA's interpretation of the preemptive effect of Congress' intent to deregulate the petroleum market in no way signals a departure from traditional preemption analysis and is in total accord with this Court's holding in *Transcontinental*. There, this Court held that in determining preemption, Congressional intent to deregulate is entitled to equal weight as a federal decision to regulate actively. *Transcontinental*, 106 S. Ct. 709. But Petitioners denounce TECA's decision as presenting a "new standard of general application that calls for the continued preemption of state law even after complete termination of federal regulation, unless there is affirmative Congressional intent to *permit* such law." Brief for Petitioners at 15 (emphasis in original). Somehow Petitioners argue that TECA's very clear emphasis on Congressional intent is in actuality a new method of preemption analysis. This is simply a mischaracterization of TECA's holding.

Petitioners misread TECA's analysis of *Transcontinental*. Contrary to Petitioners' argument, TECA analyzed *Transcontinental* as an application of traditional preemption doctrine, focusing on Congressional intent in enacting a statute. *Isla*, 811 F.2d at 1513, Pet. App. 6a. Petitioners' charge that TECA's reading reverses the burden of proof by "implicitly" holding that "the presumption should be *against* the return of state police power authority *unless* expressly authorized by Congress" is inaccurate. Brief for Petitioners at 41 (emphasis in original). Nowhere in its decision does TECA indicate that *Transcontinental*

stands for any proposition other than finding Congressional intent as the key determinant in preemption issues. *Transcontinental* clearly states that "in light of Congress' intent to move toward a less regulated national natural gas market, its decision to remove jurisdiction from FERC cannot be interpreted as an invitation to the States to impose additional regulations." *Transcontinental*, 106 S. Ct. at 717. TECA specifically focuses on Congress' intent to preempt state regulation of petroleum products when it states, "It is clear that Congress felt that the best mechanism to combat supply disruptions and the country's reliance on imported oil was to allow market forces to operate freely." *Isla*, 811 F.2d at 1517.

Petitioners do not focus on the policies underlying the absence of federal regulation of deep gas, namely Congress' intent to "give market forces a more significant role in determining the supply, the demand, and the price of natural gas." *Transcontinental*, 106 S. Ct. at 716. Rather, Petitioners characterize *Transcontinental*'s preemption justification as resting on a purported Congressional decision to deregulate deep gas as part of a larger, comprehensive federal scheme under which Congress still maintained regulatory control over other categories of gasoline. Petitioners' argument stems from the dissenting opinion in *Isla*. There, the dissent interpreted *Transcontinental*'s impact as an interpretation of the preemptive effect of a revision of a comprehensive regulatory scheme rather than of the "expiration" of federal controls. *Isla*, 811 F.2d at 1522. Under this reasoning, Congress can deregulate a market partially and preclude state regulation. But, under this same reasoning, Petitioners appear to argue that if Congress decides

to deregulate a market completely, state regulations cannot be preempted. This limitation on federal sovereignty is unwarranted and without Constitutional support. The courts below acted consistently with the precepts expressed in *Transcontinental*.

F. Federal Preemption Is Measured by an Inquiry into the Full Purposes and Objectives of Congress.

In affirming the Puerto Rican District Court's order to enjoin DACO's implementation of Regulation 45, TECA engaged in traditional preemption analysis to conclude that Congress fully expected all regulation of petroleum products to cease at the end of EPAA's phase-out period. As discussed earlier, underlying all rationales for preemption is Congressional intent. Petitioners have drawn a meaningless distinction by asserting that, while EPAA's preemptive force prior to September 30, 1981, is based on a "conflict" between federal and state regulation, TECA would "convert" this "conflict" categorization into a "negative occupation of the field" after September, 1981. Brief for Petitioners at 13 and 25. Petitioners inaccurately characterize Congress' intent to allow market forces to prevail in petroleum price setting and allocation and implicitly state that preemption tests are mutually exclusive. Yet, there is no "exclusive constitutional yardstick" in determining the validity of state laws in the face of federal objectives on the same subject; thus, the Supreme Court has measured federal preemption by expressions such as "conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference." *Hines v. Davidowitz*, 312 U.S. at 67. The point of any preemption determination, despite the wording of the test or the means

by which Congress expresses itself, is accurately reading Congress' intent.

Petitioners, however, seem to go so far as to state that preemption requires a specific statutory provision; yet, this Court has held that a specific statute need not explicitly call for preemption for the doctrine to apply. Petitioners have ignored one very important aspect of preemption analysis, that the Supreme Court's "primary function is to determine whether [a state's] law stands as an obstacle to the accomplishment and execution to the full purpose and objectives of Congress." *Id.* at 67. TECA's lengthy analysis of EPAA and EPCA's wording and legislative history is the appropriate and correct inquiry into Congressional intent.

II. *Tully* Provides No Standard for Preemption in the Face of Deregulation and Is Thus Not Controlling.

Petitioners place extraordinary reliance on this Court's decision in *Tully v. Mobil Oil Corp.*, 455 U.S. 245 (1982) (per curiam) in asserting that a state's fixing of petroleum prices is not federally preempted. *Tully* involved the validity of New York's imposition of a gross receipts tax on petroleum revenues where oil companies were barred from passing their costs of the tax on to consumers. The case arose prior to September, 1981, and dealt solely with the validity of the New York regulation in the face of EPAA's explicit preemption clause. The District Court determined that New York's regulation was preempted by the EPAA, *See Mobil Oil Corp. v. Tully*, 499 F. Supp. 888 (N.D.N.Y. 1980), *aff'd*, 653 F.2d 497 (Temp. Emer. Ct. App. 1981), *vacated and remanded*, 455 U.S. 245 (1982), and TECA thereafter upheld the District Court's Order enjoining New York's enforcing

its anti-passthrough regulation. *See Mobil Oil Corp. v. Tully*, 653 F.2d 497 (Temp. Emer. Ct. App. 1981), *vacated and remanded*, 455 U.S. 245 (1982); *Mobil Oil Corp. v. Dubno*, 492 F. Supp. 1004 (D. Conn. 1980), *aff'd in part, dismissed in part*, 639 F.2d 919 (2d Cir.), *cert. denied*, 452 U.S. 967 (1981).

When the case finally reached this Court, Sept. 30, 1981 had passed and Presidential authority to regulate prices under EPAA no longer existed. This Court summarily concluded that "the judgment and injunction are not appropriately framed for this Court to review" and thereafter remanded the case to TECA "for reconsideration in light of the expiration of federal price control authority." *Tully*, 455 U.S. at 246.

This Court refused to express an opinion on whether federal interests continued to preempt New York's law after the expiration of federal price control authority. As Justice Stevens stated in his dissent, no question concerning the enforceability of New York's law after expiration of federal price control authority was before the Court, and "since the subsequent expiration of the federal authority has no bearing on [the] question, it simply would affirm [TECA's] judgment." *Tully*, 455 U.S. at 251.

Petitioners incorrectly claim that "This Court Previously Held that State Petroleum Regulation is Not Preempted after the Expiration of the EPAA." Brief for Petitioners at 37. The issue was not decided by the Court.

III. State Law Is Preempted Only When Congress Has Expressed Its Intent to Preempt.

Based on Petitioners' false presumption that TECA's decision redefines preemption analysis,

Petitioners inaccurately assume that TECA's decision has far-reaching implications in every area where Congress has chosen not to regulate economic activity. This is simply not the case. State law is preempted only when Congress expresses its intent that a given area should be left unregulated.

For example, TECA's decision in no way implicates federal and state antitrust laws that prohibit price discrimination, below-cost sales, or predatory pricing. These statutory plans are intended to support the proper functioning of the very market forces that Congress has declared controlling here. *See, e.g.*, Section 2 of the Sherman Act, 15 U.S.C. § 2 (1982) (predatory pricing and monopolization); Section 2 of the Clayton Act, 15 U.S.C. § 13 (1982) (Robinson-Patman Act prohibiting price discrimination); and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1982) (unfair competition including certain below-cost sales).

Many states have specific statutes declaring below-cost sales unlawful, R. Fellmeth & T. Papageorge, *A Treatise on State Antitrust Law and Enforcement: With Models and Forms* 21 (1978); state laws differ from the general prohibitions of the antitrust laws in that they are often detailed and often specify particular products to which they apply. While many states' below-cost sales laws only apply to sales of cigarettes, liquor, or dairy products, over twenty-five states have statutory provisions forbidding unfair sales, unfair discrimination and competition, or unfair trade practices, applying to all levels of the petroleum distribution chain. Fellmeth at 21.

Below-cost sales statutes, unlike price-fixing schemes similar to Puerto Rico's Regulation 45, serve

the marketplace by protecting smaller competitors from the predatory pricing of monopolists or unfair competition. State and federal purposes are thus served by the joint operation of antitrust laws and more specific state below-cost pricing schemes. Principles of federalism do not preclude cooperation between states and the Federal Government when the unconflicting interests of both are served. Since Congress has neither explicitly nor implicitly stated that federal antitrust laws preempt state below-cost sales statutes, affirmance of TECA's decision in no way implicates this joint protection of the marketplace.

CONCLUSION

For reasons stated, the judgment of the Temporary Emergency Court of Appeals should be affirmed.

PETER L. DE LA CRUZ*
CATHERINE N. ROEMER
KELLER AND HECKMAN
1150 17th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 956-5600

BARBARA FAULKNER
PETROLEUM MARKETERS
ASSOCIATION OF AMERICA
1120 Vermont Avenue, N.W.
Suite 1130
Washington, D.C. 20005
(202) 331-1198

*Counsel of Record

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Washington, D.C.